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**THE IMPACT OF THE *CHARTER OF
RIGHTS AND FREEDOMS* ON
CANADIAN ADMINISTRATIVE LAW**

**Faculty of Law
McGill University, Montreal**

**A thesis submitted to McGill University in partial fulfilment of the requirements of
the degree of Doctor of Civil Law**

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Abstract

The *Canadian Charter of Rights and Freedoms* can be interpreted in two ways regarding its relation with administrative law. First, as an alternative statutory remedy against government; second, as a general democratic mandate to reconsider the foundations of Canadian administrative law. Nevertheless, in spite of the entrenchment of the *Charter*, the former interpretation has prevailed. Indeed, since 1982, the *Charter* has developed as a distinct body of rights operating separately from administrative law remedies.

The interpretation of the *Charter* as a distinct statutory remedy has caused problems in both the definition of administrative power under the *Charter* and in the judicial review of administrative action. First, the interpretation of the *Charter* as autonomous remedy has polarized the definition of administrative power insofar as administrative authorities can either apply or not apply the *Charter*. However, both solutions are extreme: administrative authorities are not superior courts; conversely, the notwithstanding clause set aside, the power to give effect to the *Charter* cannot validly be withdrawn. Second, at the judicial level, even though it is part of the Constitution, the *Charter* has been treated as an autonomous cause of action against government, thus distinct from inherent judicial powers. This has prompted a separate regime of judicial power under the *Charter*, and separate constitutional and administrative law standards of review.

However, the autonomy of the *Charter* and administrative law, at both administrative and judicial levels, is being reconciled through the integration of the *Charter* into the process of statutory interpretation, thus minimizing the distinction between “administrative law” and the “law of the *Charter*”.

Résumé

La *Charte canadienne des droits et libertés* impose deux interprétations possibles quant à ses rapports avec le droit administratif. Premièrement, elle peut être analysée comme source autonome de remède à l'encontre de l'administration; deuxièmement, comme mandat démocratique général de refondre le droit administratif. En revanche, malgré son enchâssement, la première interprétation fait autorité. En effet, depuis 1982, les droits contenus dans la *Charte* ont été analysés comme remèdes autonomes vis-à-vis de ceux offerts par le droit administratif.

La définition de la *Charte* comme remède autonome est la source de problèmes aux niveaux administratifs et judiciaires. Dans le premier cas, l'interprétation de la *Charte* comme remède autonome a polarisé les pouvoirs des autorités administratives, dans la mesure où celle-ci peuvent, ou bien ne peuvent pas donner effet à la *Charte*. En revanche, les tribunaux administratifs ne sont pas des cours supérieures. En outre, le pouvoir de donner effet à la *Charte*, en dehors du mécanisme prévu par la clause nonobstante, ne peut être retiré. Au niveau judiciaire, bien que partie intégrante de la Constitution, la *Charte* est traitée comme remède statutaire autonome à l'égard du gouvernement, distinct du pouvoir judiciaire inhérent. Ceci a donné lieu à deux régimes juridiques autonomes, ainsi que normes de contrôle administratives et constitutionnelles distinctes.

Néanmoins, l'autonomie de la *Charte* à l'égard du droit administratif, tant au niveau administratif que judiciaire, se réduit par l'intégration de la *Charte* dans le processus de l'interprétation de la loi, minimisant ainsi la distinction entre le "droit administratif" et le "droit de la *Charte*".

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“The forms of action we have buried, but they still rule us from their graves.”

F.W. Maitland, *The Forms of Action at Common Law* (1909)

“[T]he *Charter* was not enacted in a vacuum. It was created to form a part – a very important part – of the Canadian legal system and, accordingly, must fit into that system.” Per MacIntyre J. in *R. v. Mills*, [1986] 1 S.C.R. 863 at 956.

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Introduction

Since the introduction of the *Canadian Charter of Rights and Freedoms*,¹ the legitimacy of judicial review of legislation has dominated legal discussion, although two important facts warrant interrogations as to its importance. First, the enforcement of the *Charter* is more concerned with the actions of public officials than it is with statutes. This was noted by B.L. Strayer in his revised study of *Judicial Review of Legislation as The Canadian Constitution and the Courts*, stating: “the enforcement of the Constitution now frequently involves an examination of the executive, instead of legislative, action”.² Indeed, almost twice as many cases involving the *Charter* concern the conduct of a public official, as opposed to a challenge to a statute.³ Nevertheless, most of the debate concerning the *Charter* has focused on judicial review not from a perspective of administrative and executive action but from that of electoral sovereignty, as if the Constitution is exclusively or even essentially used to strike down acts of Parliament and legislatures.

Second, while judicial review is of increasing importance, it is only important because of the rise of administrative power. Thus, it remains exceptional and most conflicts between individuals and government regarding fundamental rights do not lead to judicial intervention; the administrative process deals far more with individual rights than do judges. While criminal law plays an important role in the statistical importance of judicial scrutiny of government action, both the consequences of judicial review and its frequency

¹ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

² B.L. Strayer, *The Canadian Constitution and the Courts*, 3rd ed. (Toronto: Butterworths, 1988) at 1.

³ P.J. Monahan, “A Critic’s Guide to the *Charter*” in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) [Sharpe, *Charter Litigation*] 383 at 395; P.J. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 38 [Monahan, *Politics*]; F.L. Morton & M.J. Whitney, “Charting the *Charter*, 1982-1985: A Statistical Analysis” (1987) Can. Hum. Rts. Y.B. 65. Other statistics point to executive conduct counting in just over half of cases: F.L. Morton, P.H. Russel & M.J. Whitney, “The Supreme Court’s First One Hundred *Charter* of Rights Decisions: A Statistical Analysis” (1992) 30 Osgoode Hall L.J. 1.

in relation to administrative adjudication demonstrate that the branch of government that has received the greatest increase in power in the last half century while nevertheless evading academic scrutiny is not the judiciary but the executive and its administrative dismemberments. Indeed, there are more opportunities for violating individual rights where the perpetrator is an independent administrative body or clerk, rather than a legislative assembly as a whole. It is therefore fair to say that the most dangerous branch of government, at least on a statistical level, is the executive and its administrative dismemberments because it is engaged in the day-to-day activities that affect individuals.

This nexus between the *Charter* and administrative action raises the question as to the true nature of Canadian administrative law: Is administrative law an autonomous body of law regulating the relations between public authorities and private individuals, based on fundamentally different rationales and principles, or it is merely a legal discipline like any other, part of the “general law” and only to be distinguished from private law for didactic reasons?⁴ In Canada, it is generally accepted that administrative law is not autonomous from the general law. Thus, as Beetz J. stated:

“It must be remembered that in Anglo-Canadian law, administrative law does not constitute a complete and independent system, separate from the ordinary law and administered by specialized courts. On the contrary, it is the ordinary law, administered by the courts of law, which is made a part of public law and the provisions of which cover the public administrative authority, unless they are replaced by incompatible legislative provisions, or supplanted by rules peculiar to the royal prerogative, that group of powers and privileges belonging only to the Crown.

It follows that faced with the necessity of qualifying and regulating a given legal relationship in public law, the jurist of the Anglo-Canadian tradition must necessarily carry out this function with the concepts and rules of the ordinary law, unless statute or prerogative require otherwise.”⁵

⁴ Some authors, in arguing that it is an “autonomous discipline”, confuse the didactic and conceptual autonomy of public law. See M. Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003) at 1.

⁵ *Québec (A.G.) v. Labrecque*, [1980] 2 S.C.R. 1057.

This confirms the long-standing opinion that unlike French *droit administratif*, the common law tradition prides itself on being based, statutory exceptions set aside, on rationales and principles used in private law relations. Indeed, lawyers in the common law world have often sought to distinguish theirs from the French system of “special treatment” of public officials, a distinction based not only on history but on the contemporary understanding that ordinary judges do not require any particular training in administration in order to participate in the public policy-making process.

However, when considered from a constitutional perspective, the Canadian unity of public and private law is difficult to reconcile with the *Charter*, which states that it applies to “government” as defined in s. 32(1), and therefore not to private law relations.⁶ This provision could therefore be read as a clear break with the common law tradition. The problem is complicated even further by the Preamble of the *Charter*, which provides that “Canada is founded upon (...) the rule of law.” According to its traditional definition, the expression “rule of law” provides that no authority is above the law and all are subject to the same law.⁷ This provision, placed in the Preamble, and therefore informing the interpretation of the document as a whole, can therefore confirm that the *Charter* does not establish a new autonomous body of law for the exclusive regulation of government activity, but rather a “new rule of law”. Nevertheless, the general trend has been to analyse the *Charter* as instituting a *droit administratif* such that individuals may choose between the bodies of constitutional and administrative law remedies against government action, which share an uncertain overlap with one another.

Indeed, constitutional and administrative law can be distinguished purposively or substantively by the nature of rights they seek to protect. In Canada, the *Charter* and administrative law have generally been defined substantively such that the *Charter* has emerged and been studied as a body of law unto itself, separate, if not autonomous from

⁶ *Retail Wholesale Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 [Dolphin Delivery].

⁷ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1885).

administrative law.⁸ Whereas constitutional law is traditionally defined as “the law prescribing the exercise of power by the organs of a State”,⁹ Mullan defines administrative law “at its most general” as “the field of law that has as its concern the statutes (other than the Constitution), principles, and the rules that govern the operation of government and its various emanations.”¹⁰ This distinction between constitutional and administrative law therefore highlights the substantive difference between the two disciplines. However, although Mullan excludes the Constitution from the study of administrative law, the references to the *Charter* throughout his textbook bear witness to the difficulty and artificiality of isolating the *Charter* from administrative law.¹¹ In this respect, an illusion of unity between public and private law could thus have been maintained by emphasising the application of the *Charter* to legislation while defining administrative law and the *Charter* as distinct bodies of law.

Moreover, Canada is not the only country to distinguish administrative and constitutional law by their substance rather than purpose. In the UK, constitutional and administrative law have traditionally been distinguished by their purpose although the introduction of the *Human Rights Act 1998*¹² has equally favoured a substantive distinction. In 1965, Wade and Bradley defined constitutional law as constituted by the “rules that regulate the structure of the principal organs of government and their relationship with each other, and determine their principal functions.”¹³ This definition emphasized horizontal relations between authorities of equal standing and delegated the relationship between individuals and government to the field of administrative law. Thus, the vertical aspect – administrative law – was defined as “the branch of public law which is concerned with the composition, powers, duties, rights and liabilities of the various organs of government

⁸ D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) [Gibson, *General Principles*].

⁹ P.W. Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, Loose-leaf ed.) vols. 1 and 2 at 1.1 (numbers refer to paragraphs) [Hogg, *Constitutional Law*].

¹⁰ D. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) [Mullan, *Administrative Law*].

¹¹ *Ibid.*, Chapter 2-C: “The Canadian Charter of Rights and Freedoms”; Chapter 6-D: “Discretionary Powers under the Charter”; Chapter 10 “Procedural Protections under the Charter and the Various Bills of Rights”; Chapter 15-B: “Jurisdiction of Administrative Tribunals and Statutory Authorities Generally to Deal with Charter and Other Constitutional Issues”.

¹² *Human Rights Act 1998* (U.K.), 1998, c. 42.

¹³ E.C.S. Wade & A.W. Bradley, *Constitutional Law*, 7th ed. (London: Longmans, 1965) at 3.

which are engaged in administration”.¹⁴ Nevertheless, the British definition of constitutional law has expanded, such that some now define it as governing the relations between principle organs of government, but also those with the citizen.¹⁵

The blurring of constitutional and administrative law could be reflect a “common law approach” to the delimitation of legal disciplines in contrast to the civil law approach, which is seen as favouring the delineation of “neat codes”. However, redefining the functions of constitutional law and maintaining a substantive distinction between the *Charter* and administrative law is arguably easier than acknowledging substantive changes in administrative law that could have been brought about by the *Charter* and the *Human Rights Act*. Indeed, in both common and civil law traditions, the distinction of constitutional and administrative law serves a didactic purpose because both disciplines describe the exercise of power by public authorities and therefore entail an inevitable overlap with one another. Thus, even though the *Charter* is part of the Constitution, nothing dictates that administrative law and the *Charter* need to be defined as separate bodies of law.

Moreover, scholarly opinions demonstrate that a substantive distinction between “*Charter* law” and administrative law is increasingly difficult to sustain. For instance, in 1985, A.J. Roman argued that the *Charter* would have a considerable impact on administrative law and that the exercise of all statutory powers should be subject to the *Charter*.¹⁶ Later, J. Evans stated: “The *Charter* has undermined the artificial barriers that have for too long separated administrative and constitutional law, and revealed the concerns and methodology that they share as components of our public law.”¹⁷ More recently, D. Dyzenhaus argued that Canadian administrative law is imbedded with

¹⁴ *Ibid.* at 587. See also H.W.R. Wade & C. F. Forsyth, qualifying administrative law as “the law relating to the control of governmental power” in *Administrative Law*, 8th ed. (Oxford: Oxford University Press, 2000) at 4.

¹⁵ A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law*, 13th ed. (New York: Adison Wesley Longman, 2003) at 9.

¹⁶ A.J. Roman, “The Possible Impact of the Canadian *Charter* of Rights and Freedoms on Administrative Law” (1985) 26 C. de D. 339.

¹⁷ J. Evans, “The Principles of Fundamental Justice: The Constitution and the Common Law”, (1991) 29 Osgoode Hall L. J. 51, at 92 [Evans, “Principles”].

fundamental values, and that the exercise of any authority should be based on the protection of fundamental values.¹⁸ To this effect, G. Cartier argues that administrative law and the *Charter* share a “hierarchical relation”.¹⁹ In 1990, B.L. Strayer argued cautiously that Canadian administrative law had been “constitutionalised”, although that “only certain aspects of the *Charter* relate to administrative law, where the two do meet, the *Charter* has supplemented or overridden the legislative and common law norms of administrative law with constitutional imperatives.”²⁰ The following decade, D. Mullan countered, arguing that there are “sound reasons and justifications for a more expansive posture than the court has adopted in this domain and that our administrative law is poorer for its failure to do so.”²¹ Thus, while in 1935 J. Willis asked how the new phenomenon of the administrative state could fit into its old constitutional structure,²² the problem faced today by Canadian public law, one could say, is the exact reverse: how can the old system of administrative law fit into the new constitutional structure?

Traditionally, the impact of the *Charter* on administrative law has been approached by asking how *Charter* rights compare with common law rights. This approach is reflected in the different means of protection offered by common law rights of natural justice and s. 7 of the *Charter*.²³ Thus, administrative law, the technical discipline that it is, should only be concerned with procedural rights and matters of substance should be the reserved

¹⁸ D. Dyzenhaus, “Fundamental Values and Administrative Law” (2002) 27 Queen’s L.J. 445.

¹⁹ G. Cartier, “Administrative Law: Twenty Years after the *Charter*” (2003) 63 R. du B. 199; G. Cartier, “The Baker Effect: A New Interface between the Canadian *Charter* of Rights and Freedoms and Administrative Law – The Case of Discretion” in D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart, 2004) at 61.

²⁰ Mr. Justice B.L. Strayer, “The Application of the *Charter* in Administrative Law: Getting your Foot in the Door” in *The 1990 Isaac Pitblado Lecture, Public Interest v. Private Rights: Striking the Balance in Administrative Law* (Winnipeg, Man.: University of Manitoba, Faculty of Law, 1991) at 2.

²¹ D. Mullan, “The Impact of the *Charter* on Administrative Law”, in *The Law Society of Manitoba 2002 Isaac Pitblado Lectures, The Charter: Twenty Years and Beyond* (Winnipeg, Man.: Law Society of Manitoba, 2003) at x-3.

²² J. Willis, “Three Approaches to Administrative Law: the Judicial, the Conceptual, and the Functional” (1935) 1 U.T.L.J. 53.

²³ D. Mullan, “The Impact of the *Charter* on Administrative Procedure: the Meaning of Fundamental Justice” in *The Law Society of Manitoba 1990 Isaac Pitblado Lectures, Public Interest v. Private Rights: Striking the Balance in Administrative Law* (Winnipeg, Man.: University of Manitoba, 1991) 29; P. Bryden, “Section 7 of the *Charter* outside the Criminal Context”, Symposium on the Late Justice Lysyk, (2005) U.B.C.L. Rev. [forthcoming]; P. Giroux, S. Rochette, S. Rousseau, “L’impact de l’article 7 de la Charte canadienne en droit administratif” in *Développements récents en droit administratif* (Cowansville: Yvon Blais, 1994) at 87.

domain of constitutional law. Needless to say, the administrative process and the judicial review of administrative action are concerned with all rights contained in the *Charter*; a study of the impact of the *Charter* on administrative law must concern itself with all provisions of the *Charter*. The real question is therefore has the *Charter* affected (1) the *common law* judicial review of administrative action, and (2) administrative action prior to judicial intervention. Indeed, comparing *Charter* rights and common law rights is not very useful, nor is it interesting because it is clear that the *Charter* has, to a certain extent, enhanced individual rights, although it has not revolutionized them. Indeed, human rights existed in Canada long before the *Charter* and their protection does not depend on the *Charter* itself, but on many external factors: government resources, political context, for instance. In addition, there are many other statutory remedies in Canada (*Canadian Bill of Rights*,²⁴ provincial human rights codes, international treaties, etc.) and therefore no reason to limit a substantive study to the *Charter*. In this respect, traditional studies of the *Charter* and administrative imply that the *Charter* is a remedy like any other and do not justify why any specific impact assessment of the *Charter* should be made in relation to administrative law.

However, there are many ways of distinguishing the *Charter* from other statutory remedies and thus reasons for assessing the impact of the *Charter* on administrative law. For one, the *Charter* is part of the Constitution,²⁵ which gives it primacy over all legislation of lesser force.²⁶ As a result, the *Charter* distinguishes itself from other statutory remedies such as the *Canadian Bill of Rights* and provincial human rights codes, often called “quasi-constitutional instruments”, which nevertheless are not entrenched. In addition, the *Charter* is much broader in scope than other statutory remedies. For one, s. 32(1) of the *Charter* provides that it binds both levels of government. Indeed, administrative law is generally perceived as a territorial discipline that varies from

²⁴ *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III [*Bill of Rights*].

²⁵ S. 52(2)(b) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*].

²⁶ *Ibid.*, s. 52(1): “The Constitution of Canada is the Supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

jurisdiction to jurisdiction,²⁷ although its diversity ultimately depends on how it is defined. In addition, because the federal *Bill* could not extend to provincial common law or bear any influence on any so-called “federal common law”,²⁸ the safe conclusion would be that the *Bill* exists on its own as a statutory remedy pleaded by parties to a federal dispute, just like any other statute. However evasive these answers may appear, questioning the implications of the *Charter* for administrative law is unavoidable, particularly because of the different circumstances of its enactment, namely its entrenchment, its application to both federal and provincial jurisdiction, and the general context of the patriation of the Canadian Constitution.

Thus, the essential question that arises is whether the *Charter* can be interpreted as establishing a body of rights and remedies operating in parallel of those available at common law and statute law, or whether it can be interpreted as a general democratic mandate to reassess the foundations of Canadian administrative law. On the one hand, the *Charter* can be seen as a statutory remedy that is pleaded by the parties and is applied as an exceptional intrusion upon the general law. Historically, this can be paralleled with the relation between common law and equity but also between statutes and the common law. Thus, in the British tradition, the written law is seen as an intruder upon the general law, and thus been interpreted as an exception. When applying “the law”, judges used to only apply the common law as the general law. To this effect, statutes used to be considered an exceptional intrusion into the body of common law judicial decisions.²⁹ The practical consequence of this was that whenever a statute did not directly apply to the case at hand, judges used the common law.³⁰ This prompted the rule that statutes in derogation of the common law should be strictly construed. In the United States, the notion that statutes live apart from the common law was criticized by J. M. Landis, who stated that the common law must include statutes as an element of its fabric.³¹ The “oil and water

²⁷ R. Leckey, “Territoriality in Canadian Administrative Law” (2004) 54 U.T.L.J. 327.

²⁸ But see R.A. Macdonald, “Encoding Canadian Civil Law” in *Mélanges Paul-André Crépeau* (Cowansville, Quebec: Yvon Blais, 1997) 579.

²⁹ Compare R. Pound, “Common Law and Legislation” (1908) 21 Harv. L. Rev. 383 at 387-88, with J.M. Landis, “A Note on “Statutory Interpretation” (1930) 43 Harv. L. Rev. 886 and J.M. Landis, “Statutes and the Sources of Law”, (1934) *Harvard Legal Essays* 213 at 219 [Landis, “Sources”].

³⁰ P.S. Atiyah, “Common Law and Statute Law” (1985) 48 Mod. L. Rev. 1, 8-12.

³¹ Landis, “Sources”, *supra* note 29.

approach”³² criticized by Landis was based on the idea that statutes were founded on policy, whereas the common law was founded on principle. This position is not without contemporary relevance since *Charter* principles are often said to be heavily policy-laden. It is also reflected in the academic and judicial dissection of the *Charter* and the quest to discover its meaning by isolating its individual words and expressions – “government”, “court of competent jurisdiction”, “reasonable limitations”, “appropriate and just”, just as for the interpretation of any statute, without taking a step back to look at the document as a whole and where and how it fits with other constitutional principles.

Alternatively, the *Charter* can be interpreted as a general democratic mandate to reconsider the powers and responsibilities of administrative authorities, as an integral part of the basis for the judicial review of administrative action, and thus administrative law as a whole. This follows the general proposition that the *Charter* and the common law should develop in unison. In *Retail Wholesale Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, the Supreme Court of Canada stated: “the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution.”³³ In *R. v. Zundel*, McLachlin J. (as she then was) stated: “the common law should develop in accordance with the values of the *Charter*”.³⁴ This dynamic interpretation is reflected in the position that the *Charter* purported to provide a minimum of rights which could not be derogated from, except by having resort to the notwithstanding clause. Under this interpretation, it would not be possible to oppose *Charter* rights with statutory or common law rights substantively because the latter two are seen as building upon a constitutional backdrop.

Between these two paradigms, the specific nature of the *Charter* and the circumstances of its enactment make it clear that it cannot be treated as an autonomous statutory remedy. However, with the academic support of a substantive distinction between administrative law and the *Charter*, Canadian courts have until now claimed undifferentiated power to

³² Expression used by J. Beatson in “The Role of Statute in the Development of Common Law Doctrine” (2001) 117 L. Q. Rev. 247 at 251.

³³ *Dolphin Delivery*, *supra* note 6 at 603; *Pepsi-Cola Canada Beverages v. Retail Wholesale Department Store Union*, [2002] 1 S.C.R. 156.

³⁴ [1992] 2 S.C.R. 731 at 771.

decide administrative law and *Charter* issues as alternative claims. Thus, although the confluence of the common law and the *Charter* has strongly been emphasized, the *Charter* has generally been treated as an exceptional intrusion upon the “general law”. Indeed, as one judge said “the *Charter* was not intended to turn the Canadian legal system upside down.”³⁵ Nevertheless, the argument of a distinct *Charter* cause of action in relation to administrative law is increasingly difficult to sustain. From an ontological perspective, since every question can be defined in constitutional terms, the impact of the *Charter* on Canadian administrative law must be analysed as a dynamic flowing from the paradigm of autonomous statutory remedy to that of general democratic mandate to reassess Canadian administrative law.³⁶

The greater legal effect of the *Charter* in the process of interpretation is reflected in the evolution of the role of the presumption of constitutionality. This notion holds that where a statute can equally withstand both valid and invalid interpretations, the former should prevail and thereby save the statute from invalidation. However, since the enactment of the *Charter*, the conventional position has emphasised the anachronism of the presumption of constitutionality as imposing an unnecessary burden on the plaintiff. Nevertheless, the absence of a presumption of constitutionality under the *Charter* is difficult to sustain because not every statutory conferral of discretion should be declared unconstitutional. Thus, the debate regarding the presumption of constitutionality has reflected confusion between determining whether an individual’s rights under the *Charter* have been violated and whether a specific statute is valid, problems which do not necessarily overlap.

Thus the challenge of integrating *Charter* rights into the process of statutory interpretation, which is all the more difficult given that rules of construction have

³⁵ *R. v. Mills*, [1986] 1 S.C.R. 863 at 953 [*Mills*].

³⁶ To this author’s knowledge, there are equally two works on the *Charter* and administrative law in the making, namely a doctoral thesis by G. Cartier at the University of Toronto, as well as a monograph by D. Mullan. See also D.P. Jones, A. de Villars, *Administrative Law*, 4th ed. (Toronto: Carswell, 2004) at 47-78, D. Mullan, “The Impact of the *Charter* on Administrative Law”, in *The Law Society of Manitoba 2002 Isaac Pitblado Lectures, The Charter: Twenty Years and Beyond* (Winnipeg: Law Society of Manitoba, 2003) and D. Dyzenhaus ed., *The Unity of Public Law* (Oxford: Hart, 2004) and “Numéro Spécial: L’impact de la Charte canadienne des droits et libertés: perspectives québécoises” (2003) 63 R. du B.

consistently sought to elucidate the “ordinary meaning” of language. However, such meaning can no longer be exactly the same under the *Charter*. In this respect, rejecting the presumption of constitutionality reflects more the instinct to preserve the autonomy of the *Charter* from the process of interpretation, isolation that is historically mirrored in the autonomy of statutes from the common law described in the United States by J. M. Landis in the 1930s. Thus, if from the conventional perspective, the return of the presumption of constitutionality would confirm an increase of deference, a more accurate reading of its role confirms the lowering threshold upon which individuals must raise constitutional issues. Thus, the definition of what constitutes a “constitutional issue” has been dynamic because disputes with government can increasingly be resolved as questions of statutory interpretation. The question therefore arises as to how this trend has affected both administrative and judicial power under the *Charter*.

PART I – IMPACT ON ADMINISTRATIVE POWER

The *Charter* is generally credited with the “judicialisation” of administrative power. Because administrative tribunals do not benefit from traditional judicial guarantees of independence, conventional wisdom safely concludes that the *Charter* has thus softened the already fluid Canadian conception of the separation of powers by providing administrative authorities with greater powers and responsibilities in the decision-making process. However, the true impact of the *Charter* lies in the fact that its broad principled structure is conceptually problematic for the common law: individual rights have traditionally been secreted through the interstices of judicial procedure, thus reflecting the venerable maxim “remedies create rights”. Thus, how do broad principles fit into a body of law that has traditionally been adverse to them? Another way of asking this question is whether the impact of the *Charter* on administrative decision-making be assessed through the lens of judicial review, or can it be assessed on its own?

Administrative decision-making has generally been assessed through the lens of judicial review insofar as judicial power has been seen as an external source of administrative regulation. Thus, some have argued that a regulatory approach to the *Charter*, as opposed to a remedial approach, is necessary in order to ensure the provision of constitutional remedies because it focuses on the prevention of future wrongs.³⁷ However, it is difficult to draw any conclusions from such analysis since it is not only judicial decisions that have an impact on administrative decision-making, but a whole host of factors, such as financial resources and political context. Moreover, *Charter* remedies do not create *Charter* rights because pending judicial intervention, government does not have a choice to act in a manner that accords with the *Charter*: the *Charter* binds all branches of government and it is not only for the judiciary to interpret it. Indeed, not only does the

³⁷ K. Roach, *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, 2003) at 3.560 (numbers refer to paragraphs) [Roach, *Remedies*].

judicial approach exaggerate the importance of contention, it also implies that constitutional rights cannot be asserted without making a formal claim before a court, or at least identifying institutions with similar attributes. This is reflected in the various positions seeking to explain the relation between rights and remedies by focusing on judicial review,³⁸ rather than looking at their relation as an overall dynamic initiated in the administrative process, that sometimes flows into the courtroom. Indeed, public lawyers, being preoccupied with judicial review,³⁹ have only provided their critics' arguments with greater substantiation under the *Charter*. In building on the myth of the judiciary as guardian of individual freedom, the *Charter* is seen as accomplished through the courts. Accordingly, Slattery argued that the judiciary is portrayed as "a gardener bringing order to an overgrown garden ... The *Charter* is for judges, not politicians or civil servants".⁴⁰ The misleading emphasis on judicial contention has even prompted the argument that the introduction of the *Charter* has supplanted democratic debate with judicial debate.⁴¹ Thus, in spite of the introduction of the *Charter*, Canadian public law is still concerned with curing pathologies than with deriving general principles of its physiology.

The problem of dissociating constitutional rights from their remediation is reflected in the definition of the power of administrative tribunals under the Constitution. Indeed, asking whether administrative tribunals, as distinct from all other governmental authorities, have the power to sanction fundamental rights masks a much deeper question: if s. 32(1) of the *Charter* states that it applies to the entirety of government, the entirety of government, to a certain extent, must apply the *Charter*, and not simply administrative tribunals. However, this leads to a further problem: what is an administrative authority, and hence the problem of defining the nature of the distinction between public and private law. From this perspective, the application of the *Charter* by administrative tribunals is

³⁸ K. Cooper-Stephenson, "Principle and Pragmatism in the Law of Remedies", in J. Berryman, ed., *Remedies: Issues and Perspectives* (Scarborough, Ont.: Carswell, 1991) 1.

³⁹ M. Bouchard, "Administrative Law in the Real World: A View from Canada" in M. Taggart, ed., *Judicial Review of Administrative Action in the 1980s*, (Auckland: Oxford University Press, 1987) at 179.

⁴⁰ B. Slattery, "A Theory of the *Charter*" (1987) 25 Osgoode Hall L.J. 701 at 704.

⁴¹ C. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Toronto: Oxford University Press, 2001).

intimately connected to the “application of the *Charter*”, that is, its scope and the definition of “government”.

Nevertheless, the scope of the *Charter* and the power to apply it have traditionally been considered separate issues such that the power to apply the *Charter* is disconnected from its actual application under s. 32(1). This is theoretically problematic because government does not have a choice between complying and not complying with the Constitution: *Charter* remedies should not create *Charter* rights. Conversely, saying that administrative tribunals do not have the power to sanction *Charter* rights because the power to do so is vested in the judiciary is not satisfactory because it “transforms the ultimate safeguard of law into an excuse for its violation”.⁴² Thus, constitutional supremacy must be given effect, which begs the question as to whether s. 52(1) of the *Constitution Act, 1982* can be reconciled with judicial independence. This endeavour has especially been difficult since the introduction of the *Charter* has not prompted a reassessment of the jurisdiction of administrative authorities, but rather its definition as an exceptional remedy sitting alongside administrative powers.

⁴² Expression of H.M. Hart Jr., “The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic” (1953) 66 Harv. L. Rev. 1362 at 1382.

CHAPTER 1 - DEFINITION OF THE PROBLEM: LIMITATION OF ADMINISTRATIVE POWER IN THE CONSTITUTION ACT, 1867

Although administrative tribunals are not bound by the same requirements of independence as superior courts, there is consistent authority to the effect that administrative tribunals exercising superior court functions should benefit from the guarantees of independence required by the Judicature provisions of the *Constitution Act, 1867* for superior courts. Thus, if an institution is a “superior court”, it must be provided with all pertaining guarantees of independence set out in the judicature provisions of the *Constitution Act, 1867*. It is irrelevant that the “superior court” is called an “administrative tribunal”. If it acts like a superior court, it must be given s. 96 guarantees. In practice, no administrative tribunal in Canada benefits from s. 96 guarantees,⁴³ a situation that is legally possible but not legally necessary. In this respect, s. 96 applies to administrative tribunals, but only sanctions those that do not provide adequate guarantees of independence.

In this respect, the Canadian constitution places limits on what functions administrative authorities can perform, which raises questions as to how this may affect their powers under the *Charter*. This principle has often been interpreted as a rule favouring restricted government, although a more appropriate interpretation recalls that administrative tribunals should benefit from a degree of independence that befits their tasks. Thus, nothing should prevent administrative tribunals from exercising the same functions as superior courts, but to do so, they must wield superior court guarantees of independence. This interpretation is reflected in the ongoing debate regarding the legitimacy of administrative tribunals in the US constitution, as it is in Canada. However, the problem that arises in Canada is that the question is not as clear cut as in the United States: the Canadian constitution does not provide as strict a separation of powers between branches of government.

⁴³ Hogg, *Constitutional Law*, *supra* note 9 at 7.3(e).

Moreover, while it is clear that provincial administrative tribunals cannot encroach of provincial superior court power, this issue is not as clear at the federal level. Thus the question arises as to whether federal administrative tribunals may encroach on federal superior court powers, and ultimately how this should affect the respective powers of provincial and federal administrative tribunals under the *Charter*. However, before examining this question, the American position will be examined so as to consider the problem of administrative encroachment on judicial power in its basic terms.

A. PROHIBITION OF ARTICLE III “LEGISLATIVE COURTS” IN THE US CONSTITUTION

On the one hand, the tripartite form of government described in the US Constitution is often seen as conflicting with the advent of the administrative state, such that the creation of administrative tribunals is restricted by the existence of judicial power. As framed, the issue has been to what extent Article III of the Constitution regarding the judiciary can tolerate the establishment of “legislative courts”.

However, debate on the independence of administrative tribunals has been polarised, which can partially be explained by the American conception of the separation of powers and judicial powers of review. In Canada, judges can sever statutes so as to prevent total invalidation. In the United States, such power is akin to a “selective veto”; courts generally declare legislative schemes constitutional or unconstitutional *in toto*. Accordingly, the constitutionality of federal administrative institutions is intimately linked to other issues such as legislative preclusion of review of otherwise valid administrative decisions. Conversely, judicial caution in carrying out the effects of an unconstitutional statute – i.e. declaring a statute unconstitutional only between the parties as opposed to the public at large – has implied that instead of striking down statutes establishing administrative tribunals as unconstitutional, courts have declared

administrative tribunals unconstitutional, allowed themselves to review claims *de novo*, while simultaneously allowing administrative tribunals to pursue their activities. Thus, by declaring schemes unconstitutional only between the parties, the judiciary has sought to devise a less aggressive limitation of administrative tribunal powers while on the other hand lowering the threshold of encroachment upon which statutory schemes will be held unconstitutional.

1. Approaches to the Constitutional Status of Federal Administrative Institutions

Two positions have emerged in the definition of constitutional limits on congressional power to create administrative institutions.

The first position interprets Article III as a structural limit on Congressional power to define a “fourth branch” of government. This position argues that the separation of powers requires the preservation of three distinct law-making processes, and that the possibility of judicial review by an Article III court is insufficient to ensure the separation of powers.⁴⁴ This approach identifies Congressional limits on the establishment of administrative institutions by distinguishing between “public” and “private” rights. Accordingly, an administrative tribunal exercising adjudicatory powers over “public rights” would be constitutional because it does not impinge on common law judicial power to adjudicate disputes, because such determinations are subject to judicial review. Conversely, a tribunal with jurisdiction over “private rights” would be unconstitutional or eventually unconstitutional only to the extent that *de novo* reconsideration of the case by district court for matters regarding “jurisdictional” or “constitutional facts”.⁴⁵ This position is questionable because the real question is not whether Congress can establish a “fourth branch” of government, but whether the agency in question benefits from an adequate degree of independence, proportional to its breadth of responsibilities.

⁴⁴ L. Kramer, “The Constitution as Architecture: A Charette” (1990) 65 Ind. L.J. 283 at 287.

⁴⁵ The founding case on the distinction between public and private rights is *Murray’s Lessee v. Hoboken Land and Improvement Co.*, (18 How.) 272 (1855) [*Hoboken*]. Compare the notion of “constitutional fact” in *Suresh infra* note 642.

This is reflected in the second, more pragmatic approach to Congressional powers to create administrative tribunals. This approach recognizes that Congress cannot create an administrative tribunal beyond federal jurisdiction defined in Article I s. 8 of the Constitution, or at least one that has more than “ancillary” jurisdiction over state law claims while allowing federal administrative tribunals adjudicating traditional common law causes of action. Bator has suggested four criteria to determine whether a federal administrative tribunal encroaches upon Article III judicial power.⁴⁶ These conditions are: (i) that the assignment of power to the administrative body must be a necessary and proper means of achieving the ends of a valid federal program; (ii) that the procedures and constitution of the institution ensure procedural due process; (iii) the scheme satisfies due process with respect to judicial review; (iv) the scheme gives an Article III court ultimate power to control the legality and constitutionality of the institution’s powers. Thus he concludes that such delegations are valid because Congress has made a “reasoned and conscientious judgment” to provide a statutory authority with adjudicative functions.⁴⁷

By taking categorical views against administrative agencies, Bator’s critics have presented themselves more as opponents of the administrative state than as protectors of judicial independence. Thus, they argue that the pragmatic needs of administrative agencies do not justify the violation of Art. III,⁴⁸ or that courts must protect constitutional values that have been given inadequate protection by political branches and the issue is not whether courts will be able to second-guess Congress too much, but too little.⁴⁹ Bator’s position reflects the problem of judging the constitutionality of administrative agencies as a whole even though they may be partially constitutional. It is pragmatic and

⁴⁶ P.M. Bator, “The Constitution as Architecture: Legislative and Administrative Courts Under Article III” 65 (1990) Ind. L.J. 233 at 267-68.

⁴⁷ *Ibid.* at 254.

⁴⁸ F. Easterbrook, “Success and the Judicial Power” (1990) 65 Ind. L.J. 277. See also D.A. Strauss, “Article III Courts and the Constitutional Structure” (1990) 65 Ind. L.J. 307 arguing that the major problem with administrative agencies is that they do not only perform judicial functions.

⁴⁹ D.J. Meltzer “Legislative Courts, Legislative Power and the Constitution” (1990) 65 Ind. L.J. 291; *contra* L. H. Tribe, *American Constitutional Law*, 3rd ed. vol. 1 (New York: Foundation Press, 2000) at 291-292 [Tribe, *American Constitutional Law* 2000].

only objectionable because it does not address the specific problem of independence of administrative authorities and the factors for its determination but concerns substantive legal issues otherwise relevant.

2. Approach Adopted by the U.S. Supreme Court

This debate is reflected in the case-law of the Supreme Court. Unfortunately, by seeking to define the scope of judicial powers of review by distinguishing between public and private rights, its approach has suffered from uncertainty.

In *Crowell v. Benson*,⁵⁰ the Court approved an administrative scheme for determination, subject to judicial appeal, of maritime employee compensation claims, while acknowledging that the case was “one of private right, that is, of the liability of one individual to another under the law as defined.”⁵¹ This scheme was permissible because in cases arising out of congressional statutes, an administrative tribunal could make findings of fact and render an initial decision of legal and constitutional questions, as long as there is adequate review in a constitutional court. Although the US Supreme Court ruled the statute constitutional, it stated that it would be interpreted as requiring judicial trial *de novo*, under the “constitutional fact doctrine”.

However, the notion of “constitutional fact” has never been clear. Accordingly, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁵² while rejecting the “constitutional fact” doctrine, the US Supreme Court invalidated the *Bankruptcy Act* because it allowed for the appointment of judges who lacked life tenure and protection against salary diminution, and only allowed for judicial review on the “clearly erroneous” standard. Moreover, since bankruptcy disputes were considered as “private rights”, that is rights created by Congress, and review was limited to the “clearly erroneous” standard, the statute was held unconstitutional, albeit only prospectively. However, by requiring

⁵¹ *Ibid.* at 51.

⁵² 458 U.S. 50 (1982) [*Northern Pipeline*].

life tenure of adjudicators and exclusive jurisdiction over “private rights”, this ruling cast doubt on the constitutionality of many government bodies. Thus, in order to limit the effects of the ruling, the Court ruled that the unconstitutionality was limited to institutions not functioning as “adjuncts” and with “limited” fact-finding duties.

In contrast, other cases give wider power to Congress in the creation of administrative agencies, and accordingly set aside the distinction between public and private rights. Thus, the Court has upheld statutory schemes providing jurisdiction over common law claims because of the review jurisdiction of the Federal Courts.⁵³ Under this approach, the Court has determined that Congress cannot confer identical power of an Article III court that would be immune from its supervision and control while rejecting any distinction between public and private rights.⁵⁴ However, the distinction between public and private rights was revived in *Granfinanciera, S.A. v. Nordberg*,⁵⁵ where the Court ruled that a cause of action involving private rights is forbidden from being placed within the adjudicative authority of a non-Article III court. Accordingly, Congress could assign common law rights arising out of tort and contract to a non Article III court. Conversely, the public/private rights approach was set aside in *Freytag v. Commissioner of Internal Revenue*,⁵⁶ where the US Supreme ruled that Congress has a “wide discretion” in assigning the task of adjudicating issues falling within federal law to federal administrative tribunals.

⁵³ *Commodity Futures Trading Commission v. Schor* 478 U.S. 833 (1986) [*Schor*]. See also *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568 (1985) [*Thomas*].

⁵⁴ *Schor*, *ibid.* at 853; *Thomas*, *ibid.* at 585-586.

⁵⁵ 492 U.S. 33 (1989).

⁵⁶ 501 U.S. 868 (1991).

B. INDEPENDENCE OF INSTITUTIONS EXERCISING “SUPERIOR COURT” FUNCTIONS IN CANADA

Although Canada does not abide by the same conception of the separation of powers as the US, both overlap because superior court functions require superior court guarantees of independence. In addition, as in the United States, it is insufficient for provinces to establish administrative tribunals whose jurisdiction is confined to subject-matter provincial jurisdiction because they may encroach on federal powers of judicial nomination under s. 96 of the *Constitution Act, 1867*. Nevertheless, the standard of encroachment has progressively been elevated and is much less politically contentious than in the United States.

Initially, the question was framed as to whether a provincial tribunal is exercising a function that should properly belong to a Superior Court. Accordingly, courts struck down any statute creating an authority exercising a “judicial function”.⁵⁷ However, this approach was progressively set aside. Thus, in the *Reference re Residential Tenancies Act*,⁵⁸ the Supreme Court listed its cumulative three step test: (1) whether the power was exercised by a federally appointed court at confederation; (2) whether the function is “principally judicial”; and (3) whether or not there has been a change in the institutional setting so as to negate the powers of superior courts. However, this test does not state whether constitutional limitations placed on administrative tribunals are limited to provincial administrative tribunals, or whether they can be extended to the federal level. The uncertainty following the *Residential Tenancies* test even prompted a proposal to

⁵⁷ For instance, Lord Atkin held that the Ontario Municipal Board could not validly receive “judicial authority”. He stated that s. 96 was one of the three “pillars in the temple of justice” and that it could not be undermined. He did not consider the relationship between the judicial and administrative features of the legislative scheme, but assumed that any attempt to confer a s. 96 function on a provincially-appointed tribunal was *ultra vires* the legislature. See *Toronto Corporation v. York Corporation*, [1938] A.C. 415. Compare *Hoboken*, *supra* note 45 at 284, holding that Congress cannot withdraw a matter that is subject to a suit at common law.

⁵⁸ *Reference re Residential Tenancies Act (Ont.)*, S.C.R. [1981] 1 S.C.R. 714 [*Residential Tenancies Act*].

amend the *Constitution Act, 1867*.⁵⁹ On the one hand, because the Canadian constitution does not separate powers as the U.S. and Australian constitutions, s. 96 purports to protect federalism more than it would the separation of powers. As a result, the introduction of the *Charter* would only confirm this by giving administrative tribunals a duty to ensure the primacy of the Constitution. On the other hand, some have argued that a challenge to the validity of legislation, or trying of a serious crime require “s. 96 degree” of independence.⁶⁰ Indeed, while it is clear that determining the validity of primary legislation has, since the enactment of the *Colonial Laws Validity Act, 1865*, been within the judicial domain, it is difficult to accept that the enactment of the *Charter* has negated this power.

Moreover, the rationale for interpreting the *Constitution Act, 1867* is important because it will determine whether administrative powers under the Constitution should be different at provincial and federal levels. At the outset, both are vulnerable under s. 7 and 11(d) of the *Charter*; and federal legislation may be inoperative if contrary to s. 2(e) of the *Canadian Bill of Rights*. However, the question arises as to whether specific independence requirements in the *Constitution Act, 1867* apply to both federal and provincial administrative tribunals. This is difficult to answer because s. 101 of the *Constitution Act, 1867* provides: “The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.” However, s. 101 does not mention any guarantees applying to courts established thereunder. For some, this would confirm that requirements of independence are more a guarantee of federalism than separation of powers, which would thus imply that courts should not place limits on administrative powers under the *Charter*.

⁵⁹ This proposed amendment, which did not generate sufficient interest, would have allowed provinces to allocate power to administrative tribunals within provincial jurisdiction, provided that tribunal decisions remained subject to judicial review by the courts. See *The Constitution of Canada: A Suggested Amendment Relating to Provincial Administrative Tribunals* (Ottawa: Department of Justice, 1983).

⁶⁰ R. Elliot, “Rethinking Section 96: From a Question of Power to a Question of Rights” in D.N. Magnusson, D.A. Soberman, eds., *Canadian Constitutional Dilemmas Revisited* (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1997) at 17 [Elliot, “Rethinking S. 96”].

Nevertheless, this would ultimately imply that federal administrative tribunals exercising superior court functions, not bound by constitutional requirements of independence, would have greater powers under the *Charter* than administrative tribunals at the provincial level. However, this situation has yet to materialise because federal administrative tribunals have been considered as legally bound by the same standards as those applicable to the provinces.

1. Scope of the Judicature Provisions of the *Constitution Act, 1867*

Some authors argue that *Judicature* provisions apply to both federal and provincial jurisdictions. This position was initiated by W. Lederman,⁶¹ and has received support of authors such as Lyon, Le Dain and Elliot. This position argues that the Supreme Court is also a federal court established under s. 101 and it is difficult to interpret the judicature provisions in the *Constitution Act, 1867* as implying that it should not benefit from at least the same independence as provincial superior courts. In Lederman's view, because s. 101 of the *Constitution Act, 1867* states Parliament may, "notwithstanding anything in this Act" provide the organization of a general court of appeal for Canada and for additional courts for the better administration of the laws of Canada, judges appointed to under s. 101 have a guaranteed salary and tenure just as provincial superior court judges. Hence, "the term "superior court" in ss. 99 and 100 includes any federal superior courts constituted under s. 101. Federal superior courts judges are therefore in the same position respecting salary, tenure, retirement and removal as judges of the provincial superior courts, and for the same constitutional reasons."⁶² In his words: "Surely the B.N.A. Act necessarily implies that the "General Court of Appeal for Canada" must be a superior court in the fullest sense, and that it is guaranteed typical and appropriate superior court appellate jurisdiction. (...) In a federal country like Canada, it is essential that the final tribunal of constitutional interpretation possess this status."⁶³

⁶¹ W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. 769, 1139 [Lederman, "Independence"].

⁶² *Ibid.* at 1176.

⁶³ *Ibid.* at 1177.

In contrast, authors such as Hogg and Strayer argue that judicature provisions in the *Constitution Act, 1867* only apply to provinces.⁶⁴ Hogg argues that the Canadian constitution does not insist on a rigid separation of powers.⁶⁵ Thus, because the Australian constitution reflects a more American than British conception of the separation of powers, the *Boilermakers'* case established that federal power is equally bound by constitutional guarantees of independence.⁶⁶ This school also seeks to minimize s. 101 courts because they constitute an exception to Canadian judicial unity. In addition, Hogg argues that the term “notwithstanding” in s. 101 refers to provincial jurisdiction over the administration of justice in s. 92(14). Thus, the term implies that the federal government is not bound by conditions of appointment, payment and tenure of federal judges and therefore that their powers are not constitutionally guaranteed.⁶⁷ This is not changed by the fact that judges in courts created pursuant to s. 101 of the *Constitution Act, 1867* benefit from all the guarantees applicable to provincial superior court judges because it is legislatively, not constitutionally required.⁶⁸ However, he says that the fact that provisions concerning the appointment and tenure and payment of provincial superior court judges do not apply is still important because “the federal Parliament, unlike the provincial Legislatures, is not under any constitutional restraint in assigning jurisdiction to federal administrative tribunals, or to officials (or to federal inferior courts if they choose to create some); such bodies may be vested with functions of a kind traditionally exercised by a superior, district or county court if the Parliament so enacts”.⁶⁹

These two interpretations are difficult to reconcile because they oppose historical and textual interpretations of the Constitution. The historical position argues that the founders did not intend s. 101 courts to benefit from the same guarantees as provincial superior courts, such that Canada’s “General Court of Appeal” would benefit from independence

⁶⁴ See also D. Beatty, arguing that Lederman’s position is not relevant in the “post-*Charter* era”: “Canadian Constitutional Law in a Nutshell” (1998) 36 *Alberta L. Rev.* 605 at 613.

⁶⁵ Hogg, *Constitutional Law*, *supra* note 9 at 7.3(f).

⁶⁶ See *Attorney-General (Cth) v. R.; Ex parte Boilermakers' Society of Australia* (1957) 95 C.L.R. 529 (P.C.) [*Boilermakers' Society*].

⁶⁷ Hogg, *Constitutional Law*, *supra* note 9 at 7.2(e).

⁶⁸ *Supreme Court Act*, R.S.C 1985, c. S-26.

⁶⁹ Hogg, *Constitutional Law*, *supra* note 9 at 7.2(e).

on a non-enforceable conventional basis, as the House of Lords. This could be confirmed by the Preamble of the *Constitution Act, 1867* which provides that Canada and its founding provinces have expressed their desire to be united with a “Constitution similar in Principle to that of the United Kingdom”.⁷⁰ Moreover, the Preamble has been interpreted as giving rise to an autonomous unwritten constitutional principle of judicial independence,⁷¹ although it is unclear what its exact implications are, and whether it would affect federal institutions.

2. Judicial Interpretations of the *Constitution Act, 1867*

Between these two interpretations, Canadian courts appear to favour the application of *Judicature* provisions of the *Constitution Act, 1867* to both provincial and federal institutions.

This was recognised in *McEvoy v. New Brunswick (A.G.)*, where the Court stated: “The judicature sections of the *Constitution Act, 1867* ... apply to Parliament as well as to Provincial Legislatures.”⁷² In doing so, the Supreme Court ruled that Parliament could not usurp s. 96 by granting control over the nomination of judges in a proposed provincial criminal court.⁷³ The Supreme Court held that Parliament could not confer jurisdiction over all indictable offences to a provincial inferior court because the trial of indictable offences was within superior court jurisdiction in 1867. Thus, piecemeal transfers are not objectionable, in contrast to wholesale transfers to a “unified criminal court”. In *Addy v. The Queen*,⁷⁴ the Federal Court ruled that s. 99 applied to both provincial and federal superior courts. However, the Federal Government did not appeal and s. 8 of the *Federal Court Act* was amended so as to provide for retirement at age 75.

⁷⁰ *Constitution Act, 1867*, *supra* note 86.

⁷¹ *Reference re Remuneration of Judges*, *supra* note 225.

⁷² [1983] 1 S.C.R. 704 at 720.

⁷³ *Ibid.*

⁷⁴ (1985), 2 F.C. 452 (T.D.).

This position was confirmed in *Macmillan Bloedel Ltd. v. Simpson*.⁷⁵ In this case, the Supreme Court added a fourth criterion to the test: “core judicial functions”, and in doing so, unified the test for both inferior courts and administrative tribunals. Most importantly, by ruling that federal legislative power could not encroach on s. 96, this case recognised that the judicature provisions apply to both federal and provincial inferior courts and administrative tribunals. This case concerned a sixteen year old boy convicted of contempt of an injunction of the Supreme Court of British Columbia, who nevertheless fell within the jurisdiction a federal statutory “youth court”. However, the federal *Young Offenders Act* provided in clear terms that only the youth court exercised jurisdiction over a contempt committed by a person of such an age. The majority held that although punishment of contempt remained within superior court jurisdiction since confederation, that it was a judicial power, and that a change in the institutional setting had negated the powers of superior courts, the “youth court” encroached upon s. 96 because it wielded exclusive rather than concurrent jurisdiction over contempt, thus encroaching on “core judicial functions”. The majority did not define the criterion but stated that jurisdiction over contempt was “obviously” such a power. The minority for its part, ruled against such a notion, stating that the Canadian constitution does not contain a separation of powers clause.⁷⁶

This approach is open to criticism because it replaces the search for adequate guarantees of independence with one for “core” judicial functions, a much more elusive inquiry. Hogg has criticised the notion of “core judicial functions” in *MacMillan Bloedel*, stating that s. 101 allows for the creation of a federal court with exclusive jurisdiction for the administration of the laws of Canada, which could impinge on “core” superior court jurisdiction.⁷⁷ That such a criterion is of limited utility and is open to manipulation will be agreed. The solution to the case is also open to criticism. The *Residential Tenancies Act* test and *Macmillan Bloedel* purport to determine whether a tribunal is constitutional although it is difficult to determine this by sole reference to s. 96 guarantees, exclusively

⁷⁵ [1995] 4 S.C.R. 725 [*Macmillan Bloedel*].

⁷⁶ McLachlin J. dissenting in *Macmillan Bloedel*, *ibid.*, whose opinion attracted the concurrence of L’Heureux-Dubé, Iacobucci and Major JJ.

⁷⁷ Hogg, *Constitutional Law*, *supra* note 9 at 7.3(f).

of other constitutional principles. In this respect, these rationales divorce s. 96 from other aspects of the Constitution such as the *Charter*. Even the dissenting opinion in *Macmillan Bloedel* argues that the *Residential Tenancies Act* test was appropriate to determine the constitutionality of the *Young Offender's Act*. However, if an accused can be tried as a minor rather than as an adult, by a court wielding sufficient independence, there is no doubt that such a benefit should not be withheld. This reflects rights guaranteed in the *Charter*, which provide for equality and fundamental justice in the criminal process. Indeed, Lederman argued that s. 96 formed part of an integrated whole, although this can only now mean the integration of other constitutional principles such as those contained in the *Charter*.⁷⁸

At a practical level, this solution provides that federal administrative tribunals exercising superior court functions must not wield lesser guarantees of independence than provincial administrative tribunals exercising such functions. In the context of the *Charter*, contrary interpretations would imply that federal administrative tribunals could have greater powers under the Constitution than those of the provinces, which are bound by superior court terms of independence. On a wider level, the historical interpretation of *Judicature* provisions in the *Constitution Act, 1867* gives rise to important interrogations regarding Canada's "General Court of Appeal", particularly with the severance of colonial ties. It is therefore difficult to interpret the *Constitution Act, 1867* without bearing in mind its new legal context, namely that Canada is fully sovereign, and that its "General Court of Appeal" now exercises final supervisory jurisdiction over provincial superior courts and is a supreme court in the full sense. The anomalous possibility of appellate courts wielding lesser independence than the courts they are constitutionally mandated to supervise but also the problem of federal administrative tribunal powers under the *Charter* has been resolved by interpreting the Constitution as requiring both federal and provincial institutions exercising superior court functions as bound by the same guarantees of independence.

⁷⁸ Lederman, "Independence", *supra* note 61 at 1172.

Conclusion

It is clear that administrative tribunals must protect constitutional rights and must comply with them in carrying out of their mandate. Conversely, this means that other constitutional principles, such as judicial independence enshrined in s. 96 of the *Constitution Act, 1867* cannot be dissociated from the powers of administrative tribunals.

Indeed, administrative tribunals must wield guarantees of independence that are proportional to the nature of the task they are to perform. As such, the notion that administrative tribunals cannot encroach on judicial power is better seen as implying that administrative tribunals can encroach on judicial power, although they can only do so with appropriate guarantees of independence. In practice, no administrative tribunal in Canada benefits from identical guarantees of independence as superior courts, although their independence can be accrued.⁷⁹ Thus, it is difficult to conclude that administrative tribunals can have the power to declare legislation unconstitutional, even without providing any formal declaration.

Second, the constitutionality of administrative tribunals exercising superior court functions can be seen as an issue regarding the separation of executive and judicial powers, although it can equally be viewed as a conflict between the legislatures and the courts. In UK, the absence of judicial power to invalidate primary legislation renders the constitutional legitimacy of administrative tribunals irrelevant, even though both countries share similar conceptions of the separation of judicial and executive powers. In the absence of any general power to invalidate statutes, British judges can compensate by increased scrutiny. Thus, the constitutional legitimacy of administrative tribunals is intimately linked to judicial power to invalidate primary legislation, a power that is

⁷⁹ Some administrative tribunals, wielding greater powers than others, have heightened guarantees to match their responsibilities, although they are not “superior courts”. This is the case of the Tribunal Administratif du Québec, which was held as lacking sufficient independence for the purposes of s. 23 of the *Quebec Charter of Rights and Freedoms*, *supra* note 232. See *Barreau de Montréal v. Quebec (A.G.)* [2001] R.J.Q. 2058, leave to appeal refused [2001] C.S.C.R. no. 547.

shared in both the US and Canada. Constitutional limitations on the powers of administrative agencies are therefore co-substantive with judicial power to declare primary legislation unconstitutional.

Third, while the Canadian Constitution does not impose as strict a separation between branches of power, it is difficult to conclude that federal administrative tribunals have greater power under the *Charter* than provincial administrative tribunals. It would be possible to argue that Parliament is not bound by the Judicature provisions in the *Constitution Act, 1867*, because the framers sought to ensure federal participation in the creation of provincial superior courts. Such an interpretation would imply that Parliament can create administrative tribunals with superior court powers while not providing the tribunal with sufficient guarantees of independence. Correlatively, this would imply that federal administrative tribunals have greater powers under the *Charter* than those created by legislatures. However, the Supreme Court has interpreted the *Constitution Act, 1867* as binding both Parliament and the legislatures, which puts both provincial and federal administrative tribunals on the same footing, as far as their powers under the *Charter* are concerned.

CHAPTER 2 - SCOPE OF ADMINISTRATIVE POWER UNDER THE CHARTER

In Canada, administrative tribunals have consistently ensured the enforcement of the Constitution. For instance, in *Northern Telecom Canada Ltd. v. Communication Workers of Canada (No. 2)*,⁸⁰ the Canada Labour Relations Board was asked to certify a union installing equipment produced by Northern Telecom, affiliate of Bell Canada, into Bell Canada's federally regulated telecommunications network. Depending on which company qualified as employer, the union will fall either in provincial or federal jurisdiction. While this prompted the Board to make a reference to the Federal Court, courts expect tribunals at the very least to develop an adequate factual record on which subsequent judicial review proceedings can take place; not doing so invites a remission of the matter.⁸¹

Thus, the role of administrative tribunals under the *Charter* was not entirely unforeseen. Indeed, during debates in the *Special Joint Committee of the Senate and the House of Commons on the Constitution*, the Hon. Svend Robinson MP recognised the potential impact of administrative tribunals on the rights of individuals before administrative tribunals and advocated for the entrenchment of pertaining procedural rights.⁸² However, the problem is not only whether administrative tribunals should abide by fundamental rights. It also implies asking whether administrative tribunals should become active in setting aside legislation that conflicts therewith under s. 52(1) of the *Constitution Act, 1982*⁸³ but also providing remedies under s. 24(1) of the *Charter*. Administrative power under the Constitution is also plausible under s. 32(1) of the *Charter*, which defines the scope of application of the *Charter*. However, because the scope of the *Charter* has generally been considered a distinct issue from the actual power to sanction *Charter*

⁸⁰ [1983] 1 S.C.R. 733 [*Northern Telecom No. 2*].

⁸¹ *Northern Telecom Ltd. v. Communication Workers of Canada*, [1980] 1 S.C.R. 115.

⁸² Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada 1st Session of the 32nd Parliament (Jan. 7, 1981) at 33:138.

⁸³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

rights, the legal basis for administrative power under the Constitution has been limited to ss. 24(1) and s. 52(1).

However, the inquiry into the power of administrative tribunals to apply the *Charter* is problematic because the *Charter* applies to all administrative authorities qualifying as government under s. 32(1) and therefore all must, to a certain extent, “apply the *Charter*”. Thus, in phrasing the inquiry into administrative power to apply the *Charter* in such a categorical manner, the Supreme Court and most academics have marginalised the constitutional responsibilities of subordinate administrative authorities, while seeking to identify judicial-like attributes as a basis for giving effect to the *Charter*. Thus, the expression “applying the *Charter*” can mean many things.

Indeed, the necessary relation between the scope of the *Charter* and the power to apply it have often been ignored. For instance, in *Trinity Western*, L’Heureux-Dubé J. held that a College of Teachers was not a human rights tribunal and therefore was not required to interpret the *Charter*,⁸⁴ although later in her analysis went on to consider whether the College of Teachers had acted in violation of the *Charter*.⁸⁵ This observation points to the conclusion that the application of the *Charter* by administrative tribunals, and its application to administrative tribunals are intimately related, although because all of government is bound by the *Charter*, all must apply it. This therefore implies that the inquiry into capacity to “apply the *Charter*” will imply a gradation of answers, and correlatively, because many collective institutions can qualify as “administrative tribunals”, each will have power to apply the *Charter*, although again, their responsibilities will too be gradated.

⁸⁴ *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at 828 [*Trinity Western*].

⁸⁵ *Ibid*, at 849.

A. ADMINISTRATIVE POWER TO GIVE EFFECT TO THE *CHARTER*

The polarisation of administrative power is reflected in the Supreme Court's generous approach to the power to sanction *Charter* rights under both s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*. Thus, the powers of administrative tribunals under the *Charter* have seen a net increase, particularly with the case of *Martin and Laseur*. This tendency is questionable because administrative power under the *Charter* must be reconciled with other constitutional provisions, namely the judicature provisions in the *Constitution Act, 1867*.⁸⁶ However, it is open to question whether it is useful to distinguish administrative power under s. 52(1) and s. 24(1) of the *Charter*. Indeed, administrative tribunals can now, by virtue of s. 52(1) to not apply legislation that conflicts with the *Charter*; in contrast s. 24(1) of the *Charter* provides administrative tribunals with power to grant *Charter* remedies if their empowering statute allows them with to do so.

1. Administrative Power under S. 52(1) Of the *Constitution Act, 1982*

The inquiry into administrative power under s. 52(1) bears three characteristics. First, it focuses on identifying power to “apply the law” and power to “apply the *Charter*” as similar issues while nevertheless separate. However, not only is it difficult to isolate the *Charter* from “the law” but all legal grant of power is necessarily a power to apply the law, which cannot lawfully be contrary to the Constitution. Second, it seeks to apply the *Charter* indiscriminately to all legislation without distinction. Third, it poses as an inquiry into the powers devolved by s. 52(1) of the *Constitution Act, 1982*, it is ultimately framed as an inquiry into statutory powers to give effect to the Constitution. Thus, the inquiry into administrative power under s. 52(1) reflects an inherent contradiction: if the effect of the Constitution is mandated by the Constitution itself, that legislation should

⁸⁶ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*].

not, cannot, be the limiting factor. This question has yet to receive a satisfactory answer under a “presumed” power to give effect to the *Charter*.

a) Explicit Legislative Power to Apply the *Charter*

Initially, the Supreme Court ruled that administrative tribunals empowered by statute to consider any question of law had the power to “apply the *Charter*”. In the first of three solutions on the question, the Supreme Court stated in *Douglas/Kwantlen Faculty Association v. Douglas College*⁸⁷ that an arbitrator could determine the constitutional validity of a mandatory retirement provisions in a collective agreement by virtue of s. 52(1). In a second case, *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*,⁸⁸ the Court stated that an administrative tribunal with express power to “apply the law” could “apply the *Charter*” and thus decide whether the exclusion from collective bargaining of agricultural workers in the *Labour Relations Act*⁸⁹ was contrary to s. 15(1). The Court found that the Board was authorized “to determine all questions of law and fact that arise in any matter before it”. Speaking for the majority, LaForest J. held that jurisdiction must be “expressly or impliedly be conferred on the tribunal by its enabling statute.”⁹⁰ Thus, the board could rule on the constitutionality of the provision before it but was not empowered to issue a formal declaration of invalidity (i.e. not a binding legal precedent), which was only within the powers of superior courts. Nevertheless, should the *Act* be invalid, the Board was empowered to set the provision aside for the case before it and allow the certification.

However, the question remained as to whether an express statutory delegation to apply the law was necessary in order to allow a tribunal to decide the constitutional questions. In both cases, Wilson and L’Heureux-Dubé JJ. dissented, stating that a delegation of power by statute should not be necessary. In *Tétrault-Gadoury v. Canada (Employment*

⁸⁷ [1990] 3 S.C.R. 570 [*Douglas College*].

⁸⁸ [1991] 2 S.C.R. 5 [*Cuddy Chicks*].

⁸⁹ R.S.O. 1980, c. 228, s. 2(b).

⁹⁰ *Cuddy Chicks*, *supra* note 88 at 14.

and Immigration Commissioner),⁹¹ the Supreme Court suggested such a possibility. This case concerned the power of a board of referees under the *Unemployment Insurance Act* to determine the scope of entitlement to benefits with regard to age within that *Act*. In *Douglas College*, the power to set aside the collective agreement provisions was vested in the arbitrator's explicit authorization to interpret and apply any act intended to regulate employment. In *Cuddy Chicks* the *Act* provided that the board could "determine all questions of law and fact that arise in any matter before it". However, no such provision existed in *Tétrault-Gadoury* with regard to the Board of Referees. Moreover, the decisions of the Board were subject to appeal by umpires, who were explicitly given jurisdiction to consider all questions of law and fact. Thus, La Forest J. concluded that the Board did not have jurisdiction to apply the *Charter*, but conceded that implicit jurisdiction would be possible had such an appeal not been available.

The solutions developed in the trilogy mark important advances of individual rights in the administrative process. However, the solutions do not provide any clear rationale for providing administrative power under the *Charter*. Some have criticised the trilogy as unnecessarily circuitous,⁹² and raised questions as to the exact implications of the distinction between tribunals that can and cannot apply the law. This distinction is far from clear. Thus, the question soon arose as to whether such a grant was necessary for administrative tribunals to benefit from any such power under the *Charter*. This question has received two diametrically opposed answers by the Supreme Court, the later of which favouring a general presumption of administrative power to "apply the *Charter*".

b) Initial Rejection of Implicit Administrative Power to Apply the *Charter*

Cooper v. Canada (Human Rights Commission) was an important shift in the definition of administrative powers to sanction *Charter* rights.⁹³ This case concerned two private airline pilots who contested their industry's policy of mandatory retirement at age sixty.

⁹¹ [1991] 2 S.C.R. 22 [*Tétrault-Gadoury*].

⁹² Hogg, *Constitutional Law*, *supra* note 9 at 37.3(b).

⁹³ [1996] 3 S.C.R. 854 [*Cooper*].

To this question, s. 15(c) of the *Canadian Human Rights Act (CHRA)* offered a clear answer: provided the required retirement age was the industry norm, there could be no discrimination in its eyes. Thus, it did not have jurisdiction over persons retired at a “normative industrially determined age”. However, instead of directly applying for judicial review for a declaration that the *CHRA* was unconstitutional, the individuals applied to the Canadian Human Rights Commission to have their case considered, and to refer it to the Tribunal for adjudication. The Supreme Court ruled by a majority of five to two that neither the Commission nor the Tribunal had jurisdiction over the case and that the appropriate remedy in such a case was to apply for a judicial declaration of unconstitutionality.

At the outset, the split between the majority and minority illustrates fundamentally different views as to how the *Charter* affects administrative and executive power, and more generally the structure of the Canadian separation of powers. The separate opinion of Lamer C.J. stated that statutory authorities have no jurisdiction to determine *Charter* issues, and accordingly, that the Supreme Court’s case-law on the matter, as it had developed in its trilogy, offended the constitutional principle of separation of powers. This was all the a violation of the separation of powers since the power to not apply legislation, as it had appeared in earlier cases, amounted to a power to set it aside. In his view, to endow administrative tribunals with the power to set aside legislation was an encroachment upon the powers of the Superior Courts, protected by sections 96 to 101 of the *Constitution Act* 1867. Moreover, many of these agencies had been created prior to 1982 and it could not have been intended that they be given the power to invalidate their own empowering instruments. Thus, it was not the role of these agencies to judge whether legislation was constitutional, which in any case, was to be presumed constitutional until otherwise declared by the courts. Therefore, the only use for the *Charter* by administrative tribunals was as a guide in the interpretation of statutory language.

The minority (McLachlin and L'Heureux-Dubé JJ.) took a view diametrically opposed to Lamer C.J.⁹⁴ This opinion, while rightly arguing that all law-making authorities have a function to play in the application of the *Charter*, implies that there must be “one *Charter* for all”⁹⁵ and that the *Charter* can only be meaningful if it is equally applied by courts and administrative tribunals. In their opinion, all law makers with power to determine general questions of law must conform to the *Charter* and therefore must consider *Charter* issues that arise in the exercise of their functions. Thus, jurisdiction to apply the *Charter* was implicit in every governmental authority's powers and only when legislation had explicitly excluded such a power would an agency be limited to considering questions of fact, to the exclusion of *Charter* issues, including those regarding its jurisdiction. In their view, this was founded on s. 52 (1) of the *Constitution Act, 1982* which provides that the Constitution is the “Supreme Law of Canada”. Thus, all decision-making tribunals applying the law must do so in a manner that gives effect to the *Charter*. Correlatively, because it is the Supreme Law of Canada, Parliament and the legislatures lack the authority to withdraw this duty. As such, all decision-making tribunals exercising statutory and prerogative powers would be obliged to consider constitutional issues raised in the course of their functions.

The majority opinion of La Forest J. sought middle ground, although it did not provide any clear answer. In contrast to his ruling in *Tétraault-Gadoury*, LaForest ruled that administrative tribunals and other such bodies do not have any inherent power to consider constitutional questions. Thus, the issue turned back to the question as to whether or not the tribunal had the authority to deal with the claim in its enabling statute, by considering composition, structure, procedure, possibility of appeal and expertise.⁹⁶ With regard to the Canadian Human Rights Commission, La Forest J. found that it did not have jurisdiction to deal with general questions of law. Being concerned with the processing and filtering of claims of violations to its enabling *Act*, and forwarding such valid claims

⁹⁴ See also The Hon. Madam Justice Beverley McLachlin, “The Role of Administrative Tribunals in Maintaining the Rule of Law” (1999) 12 Can. J. Admin. L. & Prac. 171.

⁹⁵ M.E. Baird & J.C. Kleefeld, *The Charter and Administrative Law, Applicability, Jurisdiction and The Power To Grant Remedies* (Vancouver: Continuing Legal Education Society Of British Columbia, 1999) at 11, online: Lawson Lundell

<<http://www.lawsonlundell.com/resources/theCharterandadministrativelaw.pdf>>.

⁹⁶ *Cooper*, *supra* note 93 at 888.

to the tribunal for adjudication, the Commission was not an adjudicative body. Moreover, should it be obliged to deal with constitutional claims, this would seriously undermine the whole process and prevent it from fulfilling its mandate in “an accessible, efficient and timely manner”. Moreover, La Forest J. stated that Commissioners did not have any expertise in the specific question before them, which were best suited for consideration by a court of law.

However, La Forest J. did not rule out the possibility that constitutional questions could be considered within a tribunal, provided the claim had been forwarded with due regard to its jurisdiction, and that it was institutionally capable of sustaining an adversarial argument required for the proper adjudication of legitimate constitutional claims. In his view, tribunals were not the appropriate forum to determine the validity of their own empowering legislation. Moreover, even if tribunals did function like courts, they did not have the required degree of expertise and the proper rules of evidence so as to screen constitutional challenges to their own empowering instrument. Lastly, he noted that “the added complexity, cost and time that would be involved when a tribunal is to hear a constitutional question would erode to a large extent the primary goal sought in creating the tribunals, that is, the efficient and timely adjudication of human rights complaints.”⁹⁷ In conclusion, although tribunals have jurisdiction to deal with “general” constitutional questions, they have no authority to question the constitutional validity of a provision of their empowering instrument.

c) Presumption of Administrative Power to Apply the *Charter*

In a spectacular reversal, the Supreme Court ruled in *Nova Scotia (Worker's Compensation Board) v. Martin* and *Nova Scotia (Worker's Compensation Board) v.*

⁹⁷ *Ibid.* at 897.

Laseur,⁹⁸ that administrative tribunals could set aside (albeit not formally) primary legislation that conflicts with the *Charter*. Both cases concerned individuals who had suffered chronic pain attributable to work related injuries and had made claims before an administrative tribunal. However, the *Worker's Compensation Act* and *Worker's Compensation Regulations* only provided a four-week "Functional Restoration Program" while excluding chronic pain injuries as grounds for additional compensation normally allotted to other forms of work related injuries. Given that the constitutionality of such legislation was clearly in doubt, the issue was whether the Worker's Compensation Appeals Tribunal had the power to set the *Act* and the *Regulations* aside in order to immediately affirm s. 15(1) of the *Charter*.

In a unanimous judgment given by Gonthier J., the Supreme Court ruled that the Appeals Tribunal had been endowed with the power under s. 52(1) of the *Constitution Act, 1982* to consider the constitutional validity of both the *Act* and *Regulation*, and that administrative tribunals having express statutory or implied powers to decide questions of law have "concomitant jurisdiction to decide the constitutional validity of that provision".⁹⁹ However, Gonthier J. went even further, declaring that administrative tribunals having power to decide questions of law are generally "presumed to include the authority to consider their constitutional validity", although they do not have the formal power to make a binding declaration of invalidity.¹⁰⁰ This presumption, the Court noted, could be rebutted by practical considerations (i.e. issues that are too difficult or time-consuming), considerations that were not applicable in the cases at hand.

The test proposed by Gonthier J. revolves around looking at the tribunal's empowering statute and distinguishing between tribunals with the power to apply and not apply the law and conversely tribunals with power to apply and not apply the *Charter*. It can be summarised as follows. First, the question is whether the tribunal has express or implied

⁹⁸ [2003] 2 S.C.R. 504 [*Martin and Laseur*]. See also the companion case *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 [*Paul*].

⁹⁹ *Ibid.* at 515.

¹⁰⁰ *Ibid.*

power to decide questions of law arising under the challenged provision.¹⁰¹ Explicit authority could be found in the statute itself, or impliedly by looking at the statute as a whole. In this last case, implied power to decide questions of law can be found by determining whether deciding the issue is necessary for the tribunal to fulfil its mandate; determining whether the tribunal is adjudicative in nature, the interaction of the tribunal with other elements of the administrative system, and practical considerations, which however cannot override a clear implication from the statute itself. Second, if the tribunal is found to have express or implied power to decide questions of law, then it will be presumed to have the power to determine the constitutional validity of that provision with regard to the *Charter*. Third, the presumption can be rebutted by the party alleging that the tribunal does not have jurisdiction to decide questions of law by pointing to an express withdrawal of jurisdiction or that the tribunal does not have implied jurisdiction to decide *Charter* issues.

In appraising *Martin* and *Laseur*, it is clear that recognising that administrative power is bound by the *Charter* is an essential principle for the protection of individual rights in the administrative process. However, the solution, as framed, is far from satisfactory.

First, in both *Martin* and *Laseur* and *Paul*, it is open to question whether members of the Tribunal possess sufficient independence that will allow them to not apply legislation that may be unconstitutional. In the companion case of *Paul v. B.C.*, the status of members of the Forest Appeals Commission is determined by s. 194(6) the *Forest Practices Code of British Columbia*, which provides, without any further explanation, that the Lieutenant Governor in Council may determine the remuneration, reimbursement of expenses and other conditions of employment of the members of the commission.¹⁰² Similarly, in *Martin/Laseur*, s. 151 of the *Workers' Compensation Act* provides, again without any further detail, that members of the Board are appointed by the Governor in Council for renewable periods of up to four years.¹⁰³ Thus, it is difficult to accept the terms of employment of the adjudicators as guarantees of independence to give effect to the

¹⁰¹ *Ibid.* at 539.

¹⁰² R.S.B.C. 1996 Chapter 159.

¹⁰³ S.N.S. 1994-95, c. 10.

prescriptions of the *Charter*, but also to heed the call of the Supreme Court to ignore the statutory limits of their power, where they are believed to be contrary to the *Charter*.

Second, *Martin* and *Laseur* can be contrasted with the position of American administrative tribunal powers under the Constitution, which are neither prevented from considering constitutional questions, nor given the extent of powers outlined in *Martin* and *Laseur*.¹⁰⁴ The distinguishing factor in the United States is the manner in which the question is phrased: not whether administrative tribunals can or cannot apply the Constitution, but to what extent administrative power conflicts with the Constitution, and whether it is possible to interpret statutes, open to several possible interpretations, in accordance with the Constitution. Thus, where it is possible that a statute conflicts with the Constitution, and where its constitutional interpretations outnumber those constitutional, the tribunal will apply the later. As a result, the “presumption of power to apply the *Charter*” referred to in *Martin* and *Laseur* can be distinguished from the “presumption of constitutionality” used to reconcile administrative power with constitutional rights.

Third, the test developed in *Martin* and *Laseur* can also be interpreted as more restrictive than that adopted in the U.S.. Indeed, Gonthier J. distinguished between tribunals that can apply the law and those that cannot, although all tribunals have a “law-applying” function because all have to take decisions, and thus interpret the law.¹⁰⁵ Moreover, Gonthier J. distinguished between tribunals that can apply the *Charter* and those that cannot, thereby implying that Parliament and legislatures may have created a special tribunal with the power to violate *Charter* rights, a possibility not even open to Congress in the U.S. constitution. Ultimately, this isolation of “the law” from “the *Charter*”, and thus also reasonable limitations of *Charter* rights not only complicates the definition of administrative powers of authorities but defies the logic of the *Charter*, which only allows for its violation through the mechanism provided under s. 33(1).

¹⁰⁴ “The Authority of Administrative Agencies to Consider the Constitutionality of Statutes” Note (1977) 90 Harv. L. Rev. 1682 at 1706.

¹⁰⁵ *Martin* and *Laseur*, *supra* note 98 at 539. The distinction between administrative tribunals with powers to decide questions of law and those without has also been criticized by Hogg, *Constitutional Law*, *supra* note 9 at 34.2(g).

Nevertheless, some administrative tribunals have already been excluded from deciding constitutional issues. Such tribunals, of course, must “apply the *Charter*”, which confirms that the solution is far from satisfactory. For instance, the *Ontario Ministry of Health Appeal and Review Board Act* provides: “the Board shall not inquire into or make a decision concerning the constitutional validity of a provision of an Act or a regulation.”¹⁰⁶ The same can be said of the Ontario Social Benefits Tribunal. The *Ontario Works Act* provides: “The Tribunal shall not inquire into or make a decision concerning, (a) the constitutional validity of a provision of an Act or a regulation; or (b) the legislative authority for a regulation made under an Act.”¹⁰⁷ This solution even carries the support of Hogg, who states that where a tribunal is not suited for constitutional adjudication, the only solution is to subtract power by explicitly barring them from considering constitutional issues.¹⁰⁸ It is worth noting that Hogg states that because Parliament and the legislatures cannot pass laws that are in violation of the *Charter*, cannot empower an administrative tribunal to apply a law that is in violation of the *Charter*.¹⁰⁹ However, he later conceded that Parliament and the legislatures can withdraw power to apply the *Charter*.¹¹⁰ In his words, to counter the problem of expertise and efficiency, he concludes: “the only remedy is to amend the enabling statute to withdraw the function from the tribunal.”¹¹¹ However, the general principle should remain: since legislation cannot authorise the violation of the *Charter*, it cannot allow administrative authorities to so.

¹⁰⁶ *Ministry of Health Appeal and Review Boards Act*, 1998, S.O. 1998, c. 18, sch. H, s. 6(3).

¹⁰⁷ *Ontario Works Act*, 1997, S.O. 1997, c. 25, Sch. A, s. 67(2). Cited in P.W. Hogg, “Remedial Power of Administrative Tribunals” (2004) 25 S.C.L.R. (2d) 151 at 162 [Hogg, “Remedial Power”].

¹⁰⁸ *Ibid.* at 163-64.

¹⁰⁹ *Ibid.* at 153.

¹¹⁰ *Ibid.* at 162.

¹¹¹ *Ibid.* at 163-64.

2. Administrative Power under S. 24(1) of the *Charter*

It is often said that by enabling administrative tribunals with the power to consider *Charter* issues, administrative tribunals have been “forced into the realm of the judicial”.¹¹² However, rather than acknowledging a transformation of administrative jurisdiction, Canadian legal opinion has sought to limit the application of the *Charter* to authorities bearing judicial attributes. Indeed, as s. 32(1) provides, government in its entirety is bound by the *Charter*, not simply the institutions that crown the administrative process. This is reflected in the exhaustion doctrine, a principle that encourages individuals to exhaust rights of appeal before applying for judicial review. Thus the inquiry as to whether administrative tribunals are “courts of competent jurisdiction” for the purposes of s. 24(1) is of limited utility.

a) Doctrine of Exhaustion of Administrative Rights of Appeal

At the outset, it is clear that individuals must exhaust available rights of appeal before applying for review. In *Canadian Pacific Ltd. v. Matsqui Indian Band*,¹¹³ a railway company contested taxation powers of the Indian band and sought to circumvent the appeal process because members of Indian band were appointed to the relevant tribunals. The company applied for judicial review, which was dismissed, on grounds that appeal process provided adequate “alternate remedy”. The Supreme Court upheld this decision, saying that judicial review should only be available if there is no alternate remedy. In *Harelkin v. University of Regina*,¹¹⁴ a student argued that an exception to the exhaustion principle should be made because of a violation of procedural fairness in a university disciplinary committee. In spite of a right to appeal before the university senate, the

¹¹² A. M. Wallace & J.T. Casey, “The March Towards Judicialization – Administrative Tribunals at the Crossroads” C.B.A. Administrative Law Update, Ottawa, 19-20 November 1999 at 11 [unpublished].

¹¹³ [1995] S.C.R. 3.

¹¹⁴ [1979] 2 S.C.R. 561 [*Harelkin*].

student applied directly for review arguing that the violation of procedural fairness could not be cured on appeal. However, the Supreme Court rejected this argument, stating that the violation could have been cured by appealing before the Senate. The minority stated that the University had already signified its intent not to follow procedural fairness and therefore would have allowed the appeal.

Moreover, not exhausting available remedies will affect an individual's power to attack government action collaterally. Applying these considerations to the *Charter*, it is possible to see that in some circumstances, individuals might be tempted to circumvent the administrative process, ignoring government orders and wait for government enforcement on the pretext that the issue is one of constitutional nature. Naturally, collateral attack in such cases might be the most appropriate means of redress.

However, this cannot imply that individuals have an unlimited constitutional right to remain passive. In *R. v. Consolidated Maybrun Mines Ltd.*,¹¹⁵ the Supreme Court ruled that individuals challenging administrative orders should do so by means of appeal or review rather than collateral attack. In this case, the government had issued an order to a company requiring it to comply with environmental standards. However, instead of immediately challenging the order, the company ignored them. The company was then charged with a failure to comply with the order and penal proceedings were initiated. The company then defended itself by stating that the government lacked legal authority to issue such orders. The Supreme Court rejected both these arguments and stated that only general challenges to the power to issue such orders were admissible by means of collateral attack when rights of appeal and direct attack had not been used. For cases concerning the reasonableness of the order, individuals would have to use regular mechanisms such as review and appeal. This solution appears to be fair in light of the disregard of government orders, and the environmental nature of the problem although it

¹¹⁵ [1998] 1 S.C.R. 706 [*Maybrun*]. This position is preferable to the US position providing a "wait for enforcement" option except where a statute gives "prior, adequate, and exclusive" pre-enforcement review. See *United States v. Nova Scotia Food Products*, 568 F. 2d 240 (2d Cir. 1977); *Yakus v. United States*, 321 U.S. 414, 468 (1944) [*Yakus*].

is difficult to generalise the *ratio* of the Court as implying that collateral attack should be excluded for cases regarding the exercise of power.

b) Exceptions to the Exhaustion Doctrine

In practice, exceptions to the exhaustion rule have been made, although these are more related to the novelty of the question raised, or the special circumstances of each case, rather than to the “constitutional nature” of the argument in question.

Generally, it is accepted that individuals may contest the validity of a statute in court under rules of public interest standing. In these cases, they are not required to exhaust available rights of appeal, especially since they may not necessarily have entered into a relationship with government which would make such recourse relevant.¹¹⁶ This was the case in *Clark v. Peterborough Utilities Commission*,¹¹⁷ where a judicial challenge of the constitutionality of the *Ontario Human Rights Code* prompted a response by the Attorney General, who argued that the plaintiffs should first seek redress before the tribunal. Howden J. rejected this saying that a party may bring a constitutional challenge to legislation even when alternate remedy exists in administrative tribunal, and even where the tribunal has the power to hear *Charter* arguments. This solution reflects the general principle that administrative tribunals should develop a record for the courts while ensuring that individuals should not be required to exhaust available remedies where there is a legitimate doubt as to the validity of primary legislation.

Correlatively, if the exhaustion rule can be set aside where it is the legislation that is under attack, interlocutory relief to set aside legislation will also justify circumventing the exhaustion rule. While its availability is narrower than that following a ruling on merits relief, it confirms that the development of a factual record by and administrative

¹¹⁶ L.L. Jaffe, *Judicial Control of Administrative Action* (Boston: Little, Brown and Company, 1965) at 438.

¹¹⁷ (1995), 24 O.R. (3d) 7 (Ont. Gen. Div.), quashed (1998), 40 O.R. (3d) 409 (Ont. C.A.) [*Clark*].

authority can be circumvented. In *Metropolitan Stores*, the question was whether the Court could stay the proceedings of the Manitoba Labour Relations Board, acting pursuant to the Manitoba *Labour Relations Act*, pending the issue of constitutionality of the *Act* before the courts.¹¹⁸ Beetz stated that a stay would only be granted if the applicant demonstrated that there was (1) a serious issue (2) that would cause irreparable harm the applicant, and (3) that such an issue did not pass the “balance of convenience” test for granting such a stay, taking into account the public interest in relation to the applicant. In this case, the balancing test tipped in favour of the public interest of maintaining the *Act* and the stay was accordingly denied.

However, the question arises as to the availability of collateral attack when constitutional claims are being made. In the criminal context, this does not raise problems, although the curtailing of collateral attack rights in the administrative law context for individuals who have not exhausted rights of appeal and who argue that government action is unconstitutional remains open. In *Canadian Egg Marketing Agency v. Richardson*,¹¹⁹ the Court unanimously ruled that a corporation could collaterally attack government action by claiming freedom of association under s. 2 and mobility rights under s. 6. It could therefore be argued that the mitigation principle expressed in *Maybrun* would not apply where constitutional arguments are made. However, administrative bodies are required to exercise their powers in accordance with the Constitution and therefore there is no reason why constitutional arguments cannot be made in the administrative process. In *Canadian Egg*, the distinguishing factor is that the plaintiff had availed itself of rights of appeal. Moreover, the violation of rights in this case was grounded in the Agency’s empowering statute. Thus, because administrative authorities must interpret their powers in accordance with the Constitution, individuals cannot use constitutional claims as an excuse for not exercising available rights of appeal and attacking the constitutionality of government action by means of collateral attack.

¹¹⁸ *Supra*, note 331.

¹¹⁹ [1998] 3 S.C.R. 157 [*Canadian Egg*].

Indeed, the reason for granting exceptions to the exhaustion principle is not that constitutional claims pose an exception thereto, but rather, that at the time they were raised, the issues posed by the *Charter* were new and therefore demanded immediate attention. In *McKinney v. University of Guelph*, the Supreme Court heard arguments that mandatory retirement policies contained in university by-laws and collective agreements violated the *Charter*, without even requiring the individuals to use their right to lodge a complaint under the *Ontario Human Rights Code*.¹²⁰ In *Haig v. Canada*, two individuals applied for a declaration that *Canadian Human Rights Act* was unconstitutional even though they had not suffered any direct discrimination, nor made any complaint before the *Canadian Human Rights Act*.¹²¹ Also, in *Eldridge*, the applicants could have complained before the British Columbia *Human Rights Commission*, although because of the immediacy of their medical needs, applied directly to court.

While in *Ontario College of Art v. Ontario (Human Rights Commission)*,¹²² the Divisional Court used the exhaustion principle as means of limiting the fragmentation of disputes and avoiding a “piecemeal approach to the judicial review of administrative action”,¹²³ exceptions to the exhaustion rule have directly been connected to the novelty of problems posed by the *Charter*. Thus, in *Tétrault-Gadoury*, the issue was whether an administrative board had the power to “apply the *Charter*” and set aside legislation, which meant asking whether an individual could apply directly for judicial review before the Federal Court, and thus circumvent rights of appeal. In this case, LaForest J. stated: “At the time the respondent raised her constitutional challenge before the Board of Referees, the jurisdiction of the Board to entertain such a challenge presented an unsettled legal question. The temptation to raise this unresolved jurisdictional question before the Court of Appeal directly was understandable.”¹²⁴

¹²⁰ [1990] 3 S.C.R. 229 [*McKinney*].

¹²¹ *Haig v. Canada* (1992), 9 O.R. (3d) 495 (C.A.) [*Haig*].

¹²² (1993), 11 O.R. (3d) 798.

¹²³ *Ibid.* at 799-800.

¹²⁴ *Tétrault-Gadoury*, *supra* note 91 at 38.

c) Recognition of Administrative Power under S. 24(1)

The recognition administrative power under s. 24(1) underlies a deeper question: is administrative power based on the empowering statute, or is it based on the *Charter*? As demonstrated for administrative power under s. 52(1), opinions favour the definition of administrative power based on the *Charter*, although they do so while simultaneously acknowledging statutory limitations on administrative power.

In *Weber v. Ontario Hydro*, the Supreme Court stated that an administrative tribunal qualifies as a “court of competent jurisdiction” for the purposes of providing a remedy under s. 24(1) of the *Charter* if its constituent statute provides it with jurisdiction over the parties to the dispute, its subject matter, and the remedy sought.¹²⁵ The dissenting opinion stated “the fact that an arbitrator can decide that behaviour is violative of the *Charter* does not mean that the tribunal has the power to sanction that behaviour because it is a *Charter* violation. The fact that a tribunal has the ability to grant the type of relief sought does not mean that it can award that relief in any context, including that of remedying *Charter* violations.”¹²⁶

However, the dissenting judges’ argument on the powers of administrative tribunals is difficult to understand. On the one hand, the opinion stated that the tribunal could provide a remedy if its statute granted it jurisdiction over the issue. Nevertheless, the dissent also stated that administrative tribunals can set aside legislation that is contrary to s. 52(1), but they cannot issue a formal declaration of invalidity. In this respect, they cannot truly “remedy” legislative invalidity and therefore should not be seen as “courts of competent jurisdiction” for the purposes of s. 24(1). However, if a tribunal ignores statutory restrictions because it would be more consistent with the *Charter* to do so, it can provide a broader range of “remedies”, even if it is not “remedying” the legislation. It is therefore contradictory for the minority to argue that tribunals are limited by their statutory powers

¹²⁵ [1995] 2 S.C.R. 929 per McLachlin, L’Heureux-Dubé, Gonthier and Major JJ.; Iacobucci, La Forest and Sopinka JJ. dissenting [*Weber*].

¹²⁶ *Ibid.* at 933, per La Forest, Sopinka and Iacobucci JJ.

on the one hand, but to argue that they can ignore these limits if the legislation is contrary to the *Charter* by giving effect to s. 52(1).

In *Mooring v. Canada (National Parole Board)*,¹²⁷ the Supreme Court recognized that a parole board did not have the power to set aside evidence obtained in an illegal search, as would “court of competent jurisdiction” under s. 24(1). The empowering statute in this case provided that the board could take into account “all information that is relevant to a case”. The majority held that this provision did not prevent the board from excluding evidence, even if it was obtained illegally.¹²⁸ Major J. on the other hand interpreted this provision as including the power to exclude evidence.

Subsequently, the Supreme Court appeared to confirm that administrative power were defined under its empowering statute. *R. v. 974649 Ontario Inc.* confirms the rule that administrative tribunal should have power to provide remedies under s. 24(1) only if it has the power to do so.¹²⁹ The test used in this case was the “function and structure” of the tribunal. In this case, the Supreme Court ruled that an inferior court had the implied power from its statute to grant remedies (award costs). Hogg criticizes this because he says that the power should come from s. 24(1), not from the statute. He states that this has no practical implications for the case at hand, but reading the issue as one of statutory interpretation could lead to unnecessary restrictions in later cases.¹³⁰

These decisions need not be seen as contradictory because the true issue is not whether administrative tribunals are “courts of competent jurisdiction”. Indeed, authors have sought to define administrative powers under the *Charter* independently of the statutory powers, while simultaneously acknowledging statutory limitations. Thus, Hogg argues that administrative tribunals should only be allowed to provide remedies under s. 24(1) if they wield personal, remedial and subject-matter jurisdiction while stating “legislative limitations on remedial power should not limit the power of those courts to grant a

¹²⁷ [1996] 1 S.C.R. 75.

¹²⁸ *Ibid.* at 933, per *Sopinka*, La Forest, L’Heureux-Dubé, Gonthier, Iacobucci and Cory JJ.

¹²⁹ [2001] 3 S.C.R. 575 [a.k.a. *Dunedin*].

¹³⁰ Hogg, “Remedial Power”, *supra* note 107 at 159-61.

constitutional remedy”.¹³¹ This contradiction stems from the isolation of the *Charter* and administrative jurisdiction, isolation reflected in the distinction between tribunals that can apply the law and those that cannot, on the one hand, and tribunals that can and cannot apply the *Charter* on the other. Indeed, all administrative authorities are bound by the Constitution and must interpret their powers in accordance therewith. Ultimately, the increase in administrative power under s. 52(1) and the ability of administrative tribunals to ignore the interpretative limits of their powers raises the question as to the utility in distinguishing between administrative power under s. 24(1) and s. 52(1). Indeed, if administrative authorities are not bound by the terms of their powers, then there is no sense in stating that administrative authorities are “courts of competent jurisdiction” under s. 24(1), only if they possess jurisdiction over persons, remedy and subject matter.

3. Limits of Administrative Power under the *Charter*

Having recognised administrative power to apply the *Charter*, a problem arises because the *Charter* has generally been recognised as not applicable to private action. Thus, since administrative tribunals have jurisdiction over private action, what is one to make of this contradiction?

On the one hand, some argue that the *Charter* blankets all societal relations because it permits what it does not forbid.¹³² On the other, some view the *Charter* as applying only to government.¹³³ Between these two views, W. Lederman rejects both “government action” while viewing the *Charter* as excluding “extra-legal societal activity”. Lederman argues that state action is not a wrong test, but that state action is always present. It can therefore not be a legitimate criterion for determining the limits of the *Charter*’s scope. This is a legitimate argument since the enforcement of private law requires state action. However, Lederman is not clear in where to draw limits to the scope of the *Charter*.

¹³¹ *Ibid.*

¹³² Gibson, *General Principles*, *supra* note 8 at 100.

¹³³ Hogg, *Constitutional Law*, *supra* note 9 at 34.2(h). See also A. Reichman “A *Charter*-Free Domain: In Defence of Dolphin Delivery” (2002) 35 U.B.C. L. Rev. 329.

Thus, he states that law only touches on societal activity with respect to punctual laws such as torts and crimes; beyond these areas, Lederman stated that the law is not concerned with individual activity qualifying as “extra-legal societal relations”.¹³⁴

These positions can usefully be contrasted with Hans Kelsen’s view the law-making process.¹³⁵ Indeed, Kelsen’s views, expounded in the 1930s, accurately diagnose problems regarding the debate on the scope of the *Charter* and the power of administrative authorities to sanction *Charter* rights while providing a framework for their analysis.¹³⁶ Essentially, because the application of a law necessarily implies the application of a valid law, Kelsen saw the scope of “law” and the power to apply “law” as co-substantive: the scope of a law depends on whether it is valid, and validly applied. This conclusion was possible because Kelsen viewed law as a hierarchical structure.

Kelsen emphasised the hierarchical structure of legal systems because jurists of his time saw the Constitution as sitting “beside” legislation, such that the scope of the Constitution and the power to apply it had been analysed as separate issues. For Kelsen, this view reflected accepted legal theory, which asks: where are laws valid? This perspective sees law as general and abstract, and only valid within certain spheres. Kelsen criticised this view because he argued that law is not only “legislation” and law-making activities are much wider than lawyers would like to believe, and would thus include the process of individualising general norms into concrete situations. Kelsen therefore did not view the “law-making function” as restricted to the state but argued that it transcended the divide between public and private law. Thus, because each valid norm does not have the power to authorise the violation of a higher norm, each valid norm necessarily provides the basis for its enforcement.

¹³⁴ W. Lederman, “Assessing Competing Values in the Definition of *Charter* Rights and Freedoms (The Interpretative Process and *Charter* Section 1)” in Beaudoin & Ratuschny, at 131 [Lederman, “Competing Values”].

¹³⁵ H. Kelsen, *An Introduction to the Problems of Legal Theory*, translated by B. Litschewski Paulson & S.L. Paulson (Oxford: Clarendon Press, 1992) [Kelsen]. It is useful to note that this is the first English translation of Kelsen’s introductory work, arguably his most accessible.

¹³⁶ Kelsen, *supra* note 135 at 12.

Kelsen's position has been criticized, particularly in its application to administrative power, because it has been interpreted as equating law with sanction, as opposed to recognizing the directive nature of statutory delegations of power.¹³⁷ Such authors argue that Kelsen overemphasises the notion of control and that legislative power bears little relevance to sanctions, because it grants non-coercive powers, e.g. forms of distributive justice. In their view, a distinction between legislation generally-speaking and legislation backed by sanctions must be made. Thus, only the first formulation would be relevant and useful in constructing a theory of legislation for the administrative state. However, these positions appear to be a misinterpretation of Kelsen's arguments. On the one hand, the idea that each law provides the basis for its own sanction does not necessarily refer to physical coercion. Rather, because even grants of "directive" or non-coercive power can be misused, such laws, if valid (i.e. if they exist and correctly implement a higher norm), necessarily provide the basis – that is, the legal argument, for their own enforcement.

Another criticism of Kelsen's theory is that it is only concerned with abstract norms, not day-to-day situations. However, Kelsen criticized the distinction between public and private law precisely because both provide means of individualizing general norms into concrete legal situations: the administrator by taking a decision on the basis of regulations and statutes, the contractor by implementing principles of contract law.¹³⁸ At best, Kelsen argued, private and public law were two different techniques for creating law (e.g. consensus based as in contract law; unilateral means as in the administrative process). Executive and administrative agencies were not independent from the law, with no greater propensity for disregarding it than private individuals acting independently. Moreover, to distinguish between public and private spheres of activity as respectively political and non-political arenas is to ignore the relevance of policy and political power in private law. Thus, private law relations are generally analyzed as legal relations *per se*, whereas those in public law were regarded more as "power relations". Thus, without denying the substantive difficulties of devising solutions not addressed by Kelsen, particularly for broad delegations of power, Kelsen's theory provides a workable

¹³⁷ E.L. Rubin, "Law and Legislation in the Administrative State" (1989) 89 Colum. L. Rev. 369.

¹³⁸ Kelsen, *supra* note 136 at 92-96.

framework for understanding the effects of the *Charter* on both statutory and non-statutory delegations of power.

Indeed, existing limits to the application of the *Charter* reflect Kelsen's criticism of static theories of law – i.e. those which limit law to “state law” and equate law with general and abstract principles such as statute and the common law. Indeed, while administrative tribunals have greater powers under the *Charter*, these are confronted with two limits: (1) the notion that the *Charter* only applies to government; (2) the idea that only the government has a “law-creating” function and only certain forms of “law-creation” are subject to the *Charter*.

a) Public and Private Law: the Case of Collective Agreements

In *McKinney v. University of Guelph*, the majority stated that the requirement equality “before and under the law” in s.15 was satisfied by “conduct” taken under authority of law.¹³⁹ Equally, the Supreme Court stated that a collective agreement would qualify as “law” for the purposes of s.15.¹⁴⁰ However, in *McKinney*, the Supreme Court said that because the university did not qualify as “government”, the university was not deemed to have any “law-making function”. In the words of the Supreme Court, “(f)or s. 15 to come into operation, the alleged inequality must be one made by “law”. Had the universities formed part of the fabric of government, their policies on mandatory retirement would have to amount to a law for the purposes of s. 15 of the *Charter*.”¹⁴¹

This confirms the position of the British Columbia Court of Appeal in *Bhindi v. B.C. Projectionists, Local 348*, which stated that collective agreements do not fall within the

¹³⁹ *McKinney*, *supra* note 120 at 277.

¹⁴⁰ *Douglas College*, *supra* note 87 although Sopinka J. at 616 concluded that a consensual act could not be “law” for the purposes of s.15(1).

¹⁴¹ *McKinney*, *supra* note 120 at 233.

scope of the *Charter*.¹⁴² This case concerned the inclusion of a closed shop clause within a collective agreement between a private employer and a union of employees of the film industry, which prevented two individuals from obtaining employment without becoming a member of the union. Such a clause was held to be licit under the *Labour Code* of British Columbia. The individuals therefore challenged the legality of the collective agreement in respect with the *Charter*. The British Columbia Court of Appeal dismissed the application on the grounds that the law only enables unions to negotiate collective agreements, it does not oblige them. In this respect, permissive or enabling legislation did not constitute state action for the purposes of *Charter* scrutiny and therefore neither does all action taken in pursuance therewith. In rejecting the collective agreement as “government action” for the purposes of s. 32(1), Nemetz C.J.B.C. concluded:

“The collective agreement before us was not mandated by the legislature. It was entered into by two parties to a contract. Its contents do not reflect government policy. The *Labour Code* establishes the procedure whereby the private parties may conclude an enforceable collective agreement but clearly it does not require the parties to reach such an agreement or include in it a closed shop provision.”¹⁴³

The minority, for its part, put forward powerful arguments to the contrary. Hutcheon J.A. stated that it was irrelevant whether or not the legislation is permissive since s. 32(1) of the *Charter* does not distinguish between permissive and compelling statutory provisions.¹⁴⁴ Anderson J. A. stated (1) that all powers relating to collective bargaining are statutory in nature and thus bestowed by government and (2) that the exercise of statutory power is governmental in nature, regardless of upon whom it is conferred.¹⁴⁵ Arguably, the trade unions’ statutory powers to negotiate collective agreements, which apply to *all* members of a given profession, regardless of whether or not they are union members, would lead one to the conclusion that unions have “powers more extensive than a natural person.” Furthermore, is also difficult to qualify collective agreements as contracts given that contracts, by definition, only affect the parties in question. This

¹⁴² (1986), 29 D.L.R. (4th) 47, leave to appeal to the S.C.C. refused, [1986] 2 S.C.R. v [Bhindi]. Compare *Shelley v. Kraemer*, 334 U.S. 1 (1948), where the Supreme Court of the United States recognised that a court order enforcing a private covenant that violated the Constitution would be unconstitutional..

¹⁴³ *Bhindi*, *ibid.* at 48, Hinkson and Craig J.J.A. concurring.

¹⁴⁴ *Ibid.* at 74-75.

¹⁴⁵ *Ibid.* at 56-57.

decision is equally precarious because what was challenged was not the enabling legislation but the collective agreement taken thereunder. The majority, however, found it necessary to reformulate the question from being initially the constitutionality of the collective agreement taken pursuant to statutory authority, to being a challenge to that authority itself.¹⁴⁶

Nevertheless, *Bhindi* was approved by the Supreme Court in *Lavigne v. Ontario Public Service Employees Union*.¹⁴⁷ This case concerned the similar issue of an “agency-shop” clause in a collective agreement requiring all employees to pay dues to the union, regardless of their membership. In this case, the court found that because one of the parties to the agreement was a governmental institution, namely a community college under government control, the *Charter* applied to the agreement, and therefore held the agreement to fall under *Charter* scrutiny. This did not add anything new to the law and had been decided earlier.¹⁴⁸ In *Douglas/Kwantlen Faculty Assn v. Douglas College*,¹⁴⁹ the Supreme Court held that the *Charter* applied to a collective agreement requiring mandatory retirement. In this case, the collective agreement was held to be “law” for the purposes of the *Charter* because it was entered into by a body that qualified as “government” for the purposes of s. 32(1).

The court concluded unanimously that the participation of government in the collective agreement was determinant. La Forest J., speaking for the majority, referred approvingly to *Bhindi* and concluded that had the agreement taken effect without any government participation, it would have been beyond *Charter* scrutiny because the legislation in question did not oblige the parties to the agreement to include such an “agency-shop” clause, but was included by the free will of the parties. In his view, unions derived their powers from the collective agreements, and that such instruments, like other contracts should not attract constitutional scrutiny where no governmental institution is not a party: “(t)he exercise of a general power under a provision of a collective agreement or other

¹⁴⁶ In spite of these grounds, Dickson C.J. and Estey and La Forest JJ. refused leave to appeal. See *Bhindi*, *supra* note 142.

¹⁴⁷ [1991] 2 S.C.R. 211 [*Lavigne*].

¹⁴⁸ *Douglas College*, *supra* note 87.

¹⁴⁹ *Ibid.*

contract in the private sector would not be invalid simply because private parties acted in a manner contrary to the *Charter*.”¹⁵⁰ On the other hand, Wilson J. and L’Heureux-Dubé JJ., in their separate opinion, stated that the *Charter* certainly applied to permissive legislation although action taken thereunder would not reflect governmental “approval”, if only governmental acquiescence, which was sufficient to justify governmental control. Moreover, in contrast to the majority, who approved the reformulation of the legal issue by the B.C. Supreme Court from being a question of the compatibility of the collective agreement to the Constitution, to the empowering legislation itself to the Constitution, Wilson J. stated that such a reformulation was unwarranted.¹⁵¹ Such a reformulation illustrates less judicial straying beyond party submissions than it does the difficulty in trying to directly assess the constitutionality of secondary and tertiary legislation independently of the objectives of its empowering instrument. Indeed, all administrative power can be traced back to a “permissive” delegation of power.

The *ratio* in *Lavigne* has prompted two positions. For Mullan, *Lavigne* may still stand because it is based on permissive powers rather than powers of compulsion. The notion of “powers more extensive than a natural person” is grounded on the protection of the individual from the consequences of administrative compulsion. However, if such powers held by the institution are not “compulsive” but “permissive” in that they allow the authority in question latitude in the exercise of its functions, Mullan states that in spite of *Blencoe*, it may still be necessary to distinguish between legislation that “facilitates or enables.”¹⁵² On the other hand, Hogg states that *Lavigne* cannot stand because it implies that Parliament and legislatures have the power to authorise the violation of the *Charter*, a power they do not have. This view is arguably the more convincing of the two. It is doubtful the Supreme Court will stand by *Lavigne*, especially if it is contrasted with the *ratio* in *Blencoe* but also the general principle enunciated in *Eldridge* that “it is a basic principle of constitutional theory that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so.”¹⁵³ As

¹⁵⁰ Per La Forest J. in *Lavigne*, *supra* note 147 at 315.

¹⁵¹ *Ibid*, Wilson & L’Heureux-Dubé JJ.

¹⁵² *Ibid*.

¹⁵³ *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 at 654[*Eldridge*].

Hogg has pointed out, the solution in *Lavigne* implies that Parliament and legislatures cannot abridge freedom of association or any *Charter* right, but may authorize unions to do so.¹⁵⁴

b) Tertiary Legislation: General Policy Instruments

The increase in power of administrative tribunals under the Constitution is also difficult to reconcile with the notion that the *Charter* only applies to “law”, because general policy instruments form an important part of administrative power.

General policy instruments come in a variety of forms: memoranda, circulars, directives etc. They all have the common purpose of orienting governmental behaviour. Governmental authorities have the power to direct employees and do so with general policy instruments. However, the difficulty is that courts have never accepted them as “law” and consistently rejected their capacity to produce legally binding results. This is not new and existed before the introduction of the *Charter*. The difficulty is that although courts have recognised their own power to strike down Acts of Parliament, they have consistently shied away from striking down general policy instruments, by fear that this may bring about a tidal wave of litigation.

Generally, the basis for rejecting the application of the *Charter* to general policy instruments has been s. 1, which allows limitations of rights only if they are “prescribed by law”. According to the *European court of Human Rights*, as it ruled in the *Sunday Times* case, a measure is “prescribed by law” if it is accessible, ascertainable and sufficiently precise.¹⁵⁵ The tension between accessibility, ascertainability, and precision is well illustrated by the instruments of administrative decision-making: general legislation provides for accessibility although it can often be general and vague. General policy

¹⁵⁴ Hogg, *Constitutional Law*, *supra* note 9 at 34.2(d).

¹⁵⁵ *Sunday Times*, *infra* note 714.

instruments such as government directives, circulars and memoranda, tend to lean in the opposite direction: they are not widely accessible, but are very specific.¹⁵⁶

In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*,¹⁵⁷ the Supreme Court was faced with a government “memorandum” for the purposes of defining the notion of “obscenity” contained in s. 163 of the *Criminal Code*, which it characterized as oppressive and dismissive of freedom of expression, while concluding that its effect was to isolate and disparage the appellants on the basis of their sexual orientation. Despite these characterizations, the Supreme Court refused to recognize the legal consequences of these instruments. According to Binnie J., the memorandum was

nothing more than an internal administrative aid to customs inspectors. It was not law. It could never have been relied upon by Customs in Court to defend a challenged prohibition. It is the statutory decision, not the manual that constituted the denial. It is simply not feasible for the courts to review for *Charter* compliance the vast array of manuals and guides prepared by the public service for the internal guidance of officials. The courts are concerned with the legality of decisions, not with the quality of guidebooks, although of course the fate of the two are not unrelated.¹⁵⁸

This decision confirms a consistent line of authority to the effect that general policy instruments are not “law”. However, it is contradictory because it has long been established the *Charter* applies not only to “law” – whatever the contours of this notion actually are – but unequivocally also applies to “action”.¹⁵⁹ In any event, this dichotomy is of limited utility because it is generally established that the subject-matter of every application for judicial review is a governmental decision.¹⁶⁰

However, when the subject matter of a governmental decision is a directive, Courts have not allowed themselves to review the claim. For instance, in *Martineau v. Matsqui*

¹⁵⁶ C. Rogerson, “The Judicial Search for Appropriate Remedies under the *Charter*: The Examples of Overbreadth and Vagueness” in Sharpe, *Charter Litigation*, *supra* note 3 at 294-304.

¹⁵⁷ *Little Sisters*, *infra* note 720.

¹⁵⁸ *Ibid.* at 1173.

¹⁵⁹ *Eldridge*, *supra* note 153 at 644: “There is no doubt, however, that the *Charter* also applies to action taken thereunder”, confirmed in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at 333 [*Blencoe*].

¹⁶⁰ *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374 at 408 (H.L.).

Institution Inmate Disciplinary Board,¹⁶¹ the court was divided on the issue of whether or not the departmental directives were “law” within the meaning of the former s. 28(1) of the *Federal Court Act*. This provision stated that the Federal Court was not required to review “a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis”. This case concerned a disciplinary order made by a federal penitentiary. The appellant argued that the order violated natural justice and the authority has not applied its own internal directives. The majority opinion, delivered by Pigeon J., argued that recognising the binding character of the directives would flood courts. Laskin, in his dissenting opinion, retorted that this may also be said about judicial proceedings affecting a large number of persons. Laskin argued, administrative authorities should be held to follow their own prescriptions, and the courts should determine *in fine*, whether they have do so or not.¹⁶²

Indeed, the notion that governmental directives are not “law” because they are not published in the same journal as statutes conflicts with the fact that not all governmental powers are of written nature, namely prerogative powers, although such powers are nevertheless subject to review.¹⁶³ Moreover, if limitations of rights exist, the qualification of “law” will be irrelevant. In *Committee for Commonwealth v. Canada*, the Supreme Court was divided on the issue of the prohibition of political activities in airports could be ascribed to a “law” and therefore be reviewable under the *Charter*.¹⁶⁴ Sopinka and Lamer JJ. held that because restrictions on individual freedom were based on the airport manager’s actions, an internal policy directive, and could not be ascribed to the airport regulations prohibiting “any business or undertaking, commercial or otherwise”, the limitations of individual rights were not justified as a limit “prescribed by law”.¹⁶⁵ Laforest J. held that the regulation did not cover the prohibited activities, but in exercising its right to manage its property, the Crown was imposing a limit “prescribed

¹⁶¹ [1978] 1 S.C.R. 118.

¹⁶² Whether or not the 2002 amendments to s. 28(1) will affect this *ratio* remains to be seen. See *infra* note 368.

¹⁶³ *Operation Dismantle*, *supra* note 763.

¹⁶⁴ *Committee for Commonwealth*, *supra* note 613.

¹⁶⁵ *Ibid.* at 149.

by law”.¹⁶⁶ L’Heureux-Dubé J. (Cory concurring) stated that the regulations were both vague and overbroad and therefore not “prescribed by law”.¹⁶⁷ McLachlin J. (Gonthier concurring) stated that the act of the airport officials constitute a limit “prescribed by law” because the officials were acting pursuant to the Crown’s legal rights as owner of the premises. However, the exclusion of all propaganda activities was overbroad and therefore not “prescribed by law”.¹⁶⁸

Moreover, courts appear to be changing their attitudes towards general policy instruments. In *Baker*,¹⁶⁹ the Supreme Court relied upon ministerial guidelines on the exercise of humanitarian compassionate grounds pursuant to the *Immigration Act* as a “useful indicator” or “evidence” to be taken into account for the assessment of the reasonableness of a deportation order.¹⁷⁰ Moreover, in *Bell Canada v. Canadian Telephone Employees Association*, the Supreme Court ruled that “guidelines” issued by the Canadian Human Rights Commission are a “form of law”,¹⁷¹ although s. 27 of the *Canadian Human Rights Act* provided that the “guideline” is binding on the Commission. The Court noted that these provisions could be interpreted as improper delegations of law-making power since they did not refer to “regulations”. However, it stated that the guidelines were subject to the *Statutory Instruments Act* and published in the Canada Gazette. In its words:

While it may have been more felicitous for Parliament to have called the Commission’s power a power to make “regulations” rather than a power to make “guidelines”, the legislative intent is clear. A functional and purposive approach to the nature of these guidelines reveals that they are a form of law, akin to regulations. It is also worth noting that the word used in the French version of the Act is *ordonnance* -- which leaves no doubt that the guidelines are a form of law.¹⁷²

¹⁶⁶ *Ibid.* at 165.

¹⁶⁷ *Ibid.* at 166.

¹⁶⁸ *Ibid.* at 227.

¹⁶⁹ *Baker v. Canada (Minister of Employment and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*].

¹⁷⁰ *Ibid.* at 862.

¹⁷¹ *Bell Canada*, supra note 227. See also *Canada (A.G.) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 (T.D.) at 199-200, per Evans J., as he then was.

¹⁷² *Bell Canada*, *ibid.* at 902.

However, this position confirms the general rule that general policy instruments will be “regulations” where enabling legislation requires this. Nevertheless, it remains that if general policy instruments are to be recognized as producing legal effects, and that such effects are *sui generis*, these must rigorously be defined not only as distinguishable from one another, but also avoid hazardous analogies to regulations and statutes. This is reflected in the concern that general policy instruments should not be used as a surrogate for regulations. In *Ontario Film and Video*, the question was whether a censorship program violated freedom of expression, but also whether or not the delegation of power to the agency was unconstitutionally vague.¹⁷³ The difficulty arose not because the statute authorized censorship, but because it did not specify under which circumstances censorship could take place. Nevertheless, the Board had developed its own criteria, pursuant to its regulatory power authorized by the statute, and had made these publicly available. This case concerned standards published by the Ontario Board of censors. They were held not to be “law” because they were not binding on the Board.

Some have called for guidelines to be taken out of “constitutional shadows”.¹⁷⁴ What is at stake, as Mullan pointed out, is devising a regime “that can cut both ways”.¹⁷⁵ Thus, in some cases, guidelines would be considered as creating legally enforceable rights and obligations, while in others not, or more specifically should not be applied without considering the particularities of the situation. Moreover, recognising the legal existence of general policy instruments should not be treated as “fettering discretion”, insofar as they conform to the objectives of the legislation pursuant to which they have been taken.

¹⁷³ *Ontario Film and Video*, *supra* note 736.

¹⁷⁴ L. Sossin, “Discretion Unbound: Reconciling the *Charter* and Soft Law” (2002) 45 *Canadian Public Administration* 465.

¹⁷⁵ Mullan, *Administrative Law*, *supra* note 10 at 377.

B. ADMINISTRATIVE TRIBUNALS TO WHICH THE *CHARTER* APPLIES

Although administrative tribunals are presumed to have the power to apply the Charter, not all administrative tribunals are bound to the *Charter*, in the sense that the *Charter* does not always apply to an administrative tribunal. In this respect, the Supreme Court has traditionally defined administrative tribunals as having a certain degree of proximity to government, and thereby distinguished “government” for the purposes of s. 32(1) of the *Charter*, from what it has called “public decision-makers”. Thus, the notion of state action, as developed by the Supreme Court pursuant to s. 32(1) of the *Charter* does not include public bodies traditionally exercising “administrative action”.¹⁷⁶ This clear cut distinction is difficult to accept because all of government is bound by the Charter, and therefore all must apply it. Thus, there can be no clear-cut power to apply the *Charter*, and thus no clear cut-off line not to apply the *Charter*. Indeed, “administrative tribunals” come in all shapes and sizes, and there is no reason why some should have “full power” under the Charter, and others have none whatsoever. Ultimately, because the distinction between public and private action has been difficult to draw, the distinction between government and “public decision-makers” has added yet another layer to a near impossible exercise in definition.

1. Institutions under Governmental Control

The first steps in defining “government” for the purposes of the *Charter* did not consider the pre-existing notion of administrative action onto which the *Charter* could graft itself. The criteria developed by the Supreme Court, however, quickly showed their limitations.

¹⁷⁶ *Charter*, *supra* note 1, s. 32(1): “This *Charter* applies a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”

a) Sources of the Control Rationale

The notion of government control, which appeared in the first years of the *Charter*'s life to exclude its application from hospitals, crown corporations and other incorporated bodies, can be exemplified in the *McKinney* ruling, which concerned universities.¹⁷⁷ In this case, eight university professors and a librarian from the respondent universities alleged that their employer's mandatory retirement requirement for employees over age 65 violated their fundamental rights. This requirement had been established through various instruments, namely board resolutions, by-laws, pension plan provisions and collective agreements, depending on the university in question. Normally, the qualification of the universities would not have been problematic because the Ontario Human Rights Commission, which had jurisdiction over all the universities, as over all private entities, would have taken up the dispute. However, it did not have jurisdiction over the applicants, since its jurisdiction was limited to employees between the ages of eighteen and sixty-five. In response to this additional lacuna, the applicants also alleged that the *Ontario Human Rights Code*¹⁷⁸ was unconstitutional pursuant to s. 15 of the *Charter*.

The response to these allegations was categorical: the *Charter* does not apply to universities because they are private. In its words: "The exclusion of private activity from *Charter* protection was deliberate. To open up all private and public action to judicial review could strangle the operation of society and impose an impossible burden on the courts."¹⁷⁹ Moreover, "the fact that a university performs a public service does not make it part of government."¹⁸⁰ Such a test, the court pursued, "is fraught with difficulty and not warranted under s. 32."¹⁸¹ The alternative to this test was the "control test", of which the function of the institution was but an element in the determination, in addition to the

¹⁷⁷ *McKinney supra* note 120.

¹⁷⁸ R.S.O. 1990, c. H.19.

¹⁷⁹ *McKinney, supra* note 120 at 232.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

actual involvement, financial and political, of both the provincial and federal governments in the day-to-day activities of the universities.

As a consequence to this absence of control, the university in question was not deemed to have any “law-making function”. In the words of the Supreme Court, “(f)or s. 15 to come into operation, the alleged inequality must be one made by “law”. Had the universities formed part of the fabric of government, their policies on mandatory retirement would have to amount to a law for the purposes of s. 15 of the *Charter*.”¹⁸² However, “universities are statutory bodies performing a public service and may be subject to judicial review of certain decisions”.¹⁸³ Thus, according to the Supreme Court, the application of the *Charter* and judicial review of administrative action were two different questions. The *Charter* applies to government; judicial review may be exercised against government but equally to “public decision-makers”, as they have traditionally been defined according to the definition of “administrative action”.¹⁸⁴ This was an implicit reference to an earlier ruling, dating from the pre-*Charter* era, in which the Supreme Court accepted an application for judicial review against the decision of a university incorporated under the *Universities Act*.¹⁸⁵ In spite of this ruling, Dickson C.J. ruled in *McKinney* that including universities within the scope of s. 32(1) would be dangerous for Canadian society. In his words: “To open up all private and public action to judicial review could constrain the operation of society and impose an impossible burden on the Courts”.¹⁸⁶ But judicial review, by definition, has never been available to control private action, and its present scope has not yet constrained the operation of Canadian society.

¹⁸² *Ibid.* at 233.

¹⁸³ *Ibid.* at 232.

¹⁸⁴ *Ibid.*

¹⁸⁵ R.S.B.C. 1974, c. 100, now the *University Act*, R.S.B.C. 1996, c. 468. See *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105.

The application was directed at the university’s decision to dismiss one of its staff, and the validity of this decision with regard to the maxim *audi alteram partem*.

¹⁸⁶ *McKinney*, *supra* note 139 at 232.

b) Consequences of the Control Rationale

Excluding many other bodies that were not subject to government control was not, however, without its uncertainties. For example, Crown Corporations were deemed subject to the *Charter* only where they were acting as “agents of the crown”.¹⁸⁷ Thus, determining whether or not the body was acting as an agent implied, for example, determining whether the minister was implicated in the Corporation’s day-to-day activities. With regard to bodies such as hospitals, which usually operate independently from government, the control rationale was accommodated so as to accommodate the application of the *Charter* to hospitals insofar as they provide health care services.¹⁸⁸

However, important difficulties with regard to the control rationale remain. For example, over what period of time is control to be ascertained? Need control be explicit? Many crown corporations such as the Bank of Canada function on the principle of independence, but their statute provides for ministerial intervention should the Governor and the minister of finance disagree.¹⁸⁹ The capacity for such control suggests that the institution is legally operating under the threat of governmental intervention, that scrutiny over the institution is constant, and that the direct and immediate ability to intervene could not absolve any minister from denying government participation. Thus, need control be *de jure*, *de facto* or both? The answers to this question provided that the power over the institution in question must be one of “routine or regular control”.¹⁹⁰ This suggests that the application of the *Charter* is linked to government participation on a day-to-day level. Conversely, the control rationale suggests that the degree of human rights protection is subject to government interest, and privatization would bring with it the narrowing of judicial control and the available grounds for judicial remedies. Such concerns were addressed by the Supreme Court:

¹⁸⁷ See *Fidelity Insurance Company of Canada v. Cronkite Supply Limited*, [1979] 2 S.C.R. 27, holding that the presence of a government minister at the head of a corporation will suffice to justify the conclusion that the corporation is the agent of the Crown.

¹⁸⁸ *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 [*Stoffman*].

¹⁸⁹ *Bank of Canada Act*, R.S.C. 1985, c. B-2, s. 14.

¹⁹⁰ *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 and *Stoffman*, *supra* note 188.

“Governments, just as they are not allowed to escape *Charter* scrutiny by entering into commercial contracts or other “private” arrangements, should not be able to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.”¹⁹¹

If indeed, human rights should not be subject to political fluctuations, there is no need to qualify “private arrangements” as an evasion of constitutional responsibilities, especially if the Constitution does not confine the provision of services to either forms of private or public management. This statement therefore announced the extension of the *Charter* to a wider range of “public decision-makers”.

2. Institutions Implementing a Specific Government Policy

The corrective to the control criterion was consecrated in the *Eldridge* case.¹⁹² By recognizing that the *Charter* also applies to bodies implementing a specific government policy, this case enabled the widening of the *Charter* to a wider ambit of “public decision-makers”.

a) *Eldridge* and the Corrective of “Specific Government Policy”

In this case, the appellants, born deaf, had sought the medical services in a British Columbia hospital that qualified for government reimbursement under the *Hospital Insurance Act*,¹⁹³ one for treatment, the other for the birth of her child. It should also be noted, that both qualified for full medical coverage under the *Medical and Health Care Act*.¹⁹⁴ In spite of this, the hospital refused to grant them the services of a sign language interpreter for the purposes of medical diagnosis and the delivery of the child. In

¹⁹¹ *Eldridge*, *supra* note 153 at 627.

¹⁹² *Ibid.*

¹⁹³ R.S.B.C. 1979, c. 180 (now R.S.B.C. 1996, c. 204).

¹⁹⁴ S.B.C. 1992, c. 76 (now the *Medical Protection Act*, R.S.B.C. 1996, c. 286).

justifying this decision, the hospital invoked its discretionary power to determine what is, and what is not “medically necessary”, pursuant to both acts.

Following the earlier control rationale would have implied recognising that the hospital, just as the universities in *McKinney*, was an institution that operated independently from government – as hospitals usually do, and that the hospital was not bound by the *Charter*. It would also have implied that the hospital was not acting unreasonably with regard to its statutory mandate, as interpreted according to traditional common law methodology.¹⁹⁵ On the other hand, this solution could have been justified insofar as the applicants could have sought a remedy before the *British Columbia Human Rights Commission*. The urgency of the situation and the potential effects of the decision on the health of the individuals suggested, however, that an application for judicial review would be more effective because it provided a quicker and more conclusive means of redress than would a complaint before the Commission. However, this would have not been an argument to the effect that the *Charter* did not apply to the hospital; but that judicial review, as in any application, must only be exercised after all available means of recourse have been exhausted. In any event, the Supreme Court allowed the patients’ appeal and broke with its earlier rationale in allowing for the *Charter* to apply to a body that was not under government control, but was nevertheless implementing a specific government policy.

¹⁹⁵ *Eldridge*, *supra* note 153 at 650. Hogg argues that the Supreme Court should not have concluded that the *Charter* applied in *Eldridge* since the hospital does not wield any statutory power of compulsion. He states that it is implausible to characterise the provision of medical services as a statutory power since hospitals have been providing such services long before the enactment of the litigious legislation. See Hogg, *Constitutional Law of Canada* at 34.2(c). This is not an acceptable argument since it is according to present legal parameters that the Hospital’s decision must be assessed. Indeed, the *Medical Protection Act* provided comprehensive coverage equally to all B.C. residents and translation services for the deaf were not listed in the exceptions. In spite of this, the La Forest J. ruled that the Act could not be interpreted as covering sign-language interpretation, although he later conceded the opposite. See *Eldridge*, *supra* note 153 at 650-51. Arguably, the Court interpreted the Act as comprehensively providing “equal health care” to B.C. residents, rather than equally entitling all those who qualified to “comprehensive health care”.

b) An Ambiguous Notion and of Questionable Utility

The reasons for this solution, however, are not entirely clear. As stated earlier, the functional test has explicitly been rejected by the Supreme Court.¹⁹⁶ This test postulates that a body is exercising state action because of the nature of its activity. In spite of its earlier aversion to this test, the Supreme Court ruled in *Eldridge* that: “Even though a legislature may give authority to a body that is not subject to the *Charter*, the *Charter* applies to all the activities of government whether or not they may be otherwise characterized as “private” and it may apply to non-governmental entities in respect of certain inherently government actions.”¹⁹⁷ It stressed that the specific government policy was the comprehensive health care program provided to all British Columbia residents, enacted through the *Hospital Insurance Act*, which provides for the reimbursement of all hospital costs in relation to the treatment of patients, and the correlative government policy, the *Medical and Health Care Act*, designed to ensure that all concerned residents receive medically required services without charge. These two instruments enabled the Court to conclude that a “direct and precisely defined connection exists between a specific government policy and the hospital’s impugned conduct.”¹⁹⁸ La Forest J. stated that a “private activity” would not attract *Charter* scrutiny where an institution such as a hospital does not directly qualify as government, but nevertheless must fulfill its services in compliance with the *Charter*.¹⁹⁹ The *Charter* therefore does not apply to the institution as a whole, but only to the powers relating to the provision of health care.

The notion of “specific government policy”, however a progressive an outcome it provided in *Eldridge*, is not a satisfactory criterion. First, it is a mere redefinition of the court’s definition of “administrative action”. Assuming that this would justify judicial review, it opens the question why the Supreme Court went to such lengths to define the notion twice over. As Dickson C.J. stated: “The touchstone of administrative action (...)

¹⁹⁶ *McKinney*, *supra* note 120.

¹⁹⁷ *Eldridge*, *supra* note 153 at 627.

¹⁹⁸ *Ibid.* at 665.

¹⁹⁹ *Ibid.* at 661.

is the government's adoption, formulation or application of general public policy in particular situations. There is nothing in the words administration or administrative which excludes the proprietary or business decisions of governmental organizations. On the contrary, the words are fully broad enough to encompass all conduct engaged in by a governmental authority in furtherance of governmental policy business or otherwise."²⁰⁰ Moreover, if one concedes that the only available proof that the hospital is implementing a specific government policy is that it is acting pursuant to a statutory delegation of power, than it becomes less clear what utility there is in distinguishing between specific and general policies. The judicial system, universities and other institutions with government involvement all constitute an expression of government policy, although it is difficult to qualify them as either specific or general, and even more so if one asks why such a distinction should be made in the first place.

Second, the notion does not provide any rationale for understanding why one would want to apply the *Charter* in certain circumstances and not in others, and leaves open the question as to whether municipalities are subject to the *Charter*. Naturally, these democratic institutions with powers of coercion should be deemed even closer to the notion of "government" as commonly understood. Specificity of government policy thus provides more uncertainty than the earlier criterion of control. Moreover, the criterion of "government policy" rings as a "plan" but also as an "attitude" and therefore as an expression of deference thereto. Arguably, the word "government" is of little clarification:

"Policy can mean anything from a loose collection of virtually meaningless platitudes to a precise plan. The former has no operational significance, the latter is really a description of the process of implementation of an unarticulated set of value choices. All too often, "policy" is used to mask an imprecision of thought, an unwillingness or inability to say whether in the context, the speaker means "attitude" or "intention" or "objectives" or "plan" – or all or none of the above. Placing the word "government" before "policy" often merely identifies who is suffering from imprecision of thought."²⁰¹

²⁰⁰ Per Dickson C.J. in *British Columbia Development Corp. v. British Columbia (Ombudsman)*, [1984] 2 S.C.R. 447 at 470-71.

²⁰¹ A.J. Norman, "Governmental Control and Tribunals: Appeals, Directives, and Non-Statutory Mechanisms" (1985) 10 *Queen's L.J.* 476 at 482-83.

It is therefore difficult to accept the Court's use of "policy", even with the attempted clarification: it insinuates unwritten orthodoxy, presumably accepted by all, and having achieved popular acceptance, it would thereby provide a solid anchor for hinging the *Charter*. With these reservations, we turn to the most recent defining criterion for the scope of the *Charter*.

3. Institutions Wielding "Powers More Extensive Than a Natural Person"

The evolution of the state action doctrine is marked by the introduction of the notion of "powers more extensive than a natural person" by the *Blencoe* case.²⁰² This notion is important because it transforms the task of identifying an institution, while providing a more pragmatic question and workable framework than the criterion of "specific government policy". However, it is still open to argument whether this new notion is a satisfactory addition to the law.

a) Powers More Extensive than a Natural Person: the *Blencoe* Case

In this case, Mr. Blencoe had been accused of sexual harassment while serving as a minister in the government of British Columbia. His alleged conduct prompted his dismissal from both his position and from his party and the lodging of two separate complaints before the British Columbia Human Rights Commission.²⁰³ The Commission, which investigates complaints before forwarding them to the Human Rights Tribunal, took over thirty months to conclude its investigation.

²⁰² *Supra* note 620.

²⁰³ Which had been renamed during the trial from its original title, the British Columbia Council on Human Rights.

This delay prompted Mr. Blencoe to apply for judicial review in order to have the proceedings stayed. He argued that the Commission's delay in handling the complaints had caused him serious prejudice, which amounted to an abuse of process and a denial of natural justice under the common law, and also "fundamental justice" under s.7. The majority did not grant the stay, although it recognized the Commission's lack of expediency and ordered it to pay costs to Mr. Blencoe.²⁰⁴ The minority stated that the *Charter* need not apply because common law remedies were already available.²⁰⁵ The relevance of this decision to the state action doctrine is that it provided a new criterion for its definition, namely "powers more extensive than a natural person". Had the rationale provided in *Eldridge* been followed, it is not entirely clear whether or not the *Charter* could have applied. Indeed, the Commission and the Tribunal were not acting under government control, and the extent to which they were acting pursuant to a government policy was open to debate. As a functional test, "specificity of government policy" extended the scope of the *Charter* indeterminately and *Blencoe* provided a good opportunity to clarify this notion. The Commission argued that it was not under government control and therefore did not constitute "government" according to s. 32 (1). The Supreme Court easily set aside this argument:

"The Commission in this case cannot therefore escape *Charter* scrutiny merely because it is not part of government or controlled by government. In *Eldridge*, a unanimous Court concluded that a hospital was bound by the *Charter* since it was implementing a specific government policy or program. The Commission in this case is both implementing a specific government program and exercising specific powers of compulsion."²⁰⁶

The next argument was of no greater difficulty. The Commission argued the challenge was not to any statutory provision that might be said to be within the legislative sphere. In response to this, the Supreme Court cited *Eldridge*, where the *Charter* was held to apply to action taken pursuant to statutory provisions and not only enabling legislation. The third argument was that the Commission was exercising a judicial function and was

²⁰⁴ Per McLachlin C.J., L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. in *Blencoe*, *supra* note 159 at 338.

²⁰⁵ Per Iacobucci, Binnie, Arbour and LeBel JJ., *ibid.* at 383.

²⁰⁶ *Ibid.* at 334.

therefore not bound by the *Charter*. However, the Commission's adjudicative characteristics and independence from government should not have granted it immunity from *Charter* scrutiny. In refuting this argument, the Supreme Court stated: "The Commission is carrying out a legislative scheme of the *Human Rights Code* (...) (It) must act within its enabling statute."²⁰⁷ Statutory power, as seen in *Eldridge*, is not immune from *Charter* scrutiny. The difficulty, however, is that such power provides for a variety of objectives. The question is therefore to distinguish which should be scrutinized and why. In *Eldridge*, the criterion was "specificity of government policy". The new criterion introduced in *Blencoe* is arguably clearer. The Supreme Court stated that the Commission held powers of compulsion and that such powers were "not derived from the consent of the parties".²⁰⁸ The specific powers referred to were those of investigation and those to decide how to deal with complaints.²⁰⁹ Thus, the Supreme Court, following the suggestion of Hogg,²¹⁰ held that the *Charter* applied to the Commission because it held powers "more extensive than those granted to a natural person."²¹¹

b) Interpreting the Notion of "Powers More Extensive than a Natural Person"

How should the notion of "powers more extensive than a natural person" be interpreted? To begin, prerogative power can necessarily be qualified as one "more extensive than a natural person".²¹² Corporations, having limited legal personality, can undoubtedly be compared with natural persons, although it is doubtful that they necessarily have powers more extensive than those of any private individual. As D. Mullan stated: "the mere fact of incorporation under statute has seldom brought with it subjection to the norms of

²⁰⁷ *Ibid.* at 335.

²⁰⁸ *Ibid.* at 333.

²⁰⁹ S. 24 of the British Columbia *Human Rights Code* (R.S.B.C. 1996, c. 210) allows the Commission to compel the production of documents.

²¹⁰ Hogg, *Constitutional Law*, *supra* note 9 at 34.2(c).

²¹¹ *Ibid.*

²¹² The reviewability of the exercise of prerogative power was nevertheless established in *Operation Dismantle*, *supra* note 764.

public or administrative law.”²¹³ The Commission in *Blencoe* distinguished itself from other institutions because it had “powers of compulsion”, something neither private individuals and corporations wield as a matter of course. The question therefore arises as to whether “powers more extensive than a natural person” necessarily implies those of compulsion, or whether or not it may extend to all other special, exorbitant or derogatory powers not normally held by private individuals or corporations, which characterise the unilateral nature of governmental decision-making power.

However, it remains open to question as to whether the *Charter* would only apply to the institution using powers of coercion, or if it would apply regardless. S. 32(1) provides that the *Charter* applies to “all matters within the authority” of government. Mullan argues that all statutory authorities should be subject to the *Charter* independently of their classification.²¹⁴ This would appear to be more consistent with s. 32(1), which provides that the *Charter* applies to “all matters” within the power of government, not simply those more extensive than a natural person. Indeed, should the *Charter* apply only when such powers are used? Should the *Charter* apply when such powers are available but are not used? In other words: does the notion imply characterising a discreet governmental power relevant to a dispute, or can it be used to characterise governmental power as a whole?

First, it is worth noting that the notion of “powers more extensive than a natural person” is particularly relevant in the context of administrative law because this law has developed through the extension of governmental powers and the resulting need to protect individuals therefrom, while allowing legislative objectives to be achieved without impairing individual rights. Moreover, the notion closely resembles the concept of “pouvoir exorbitant de droit commun” or “prérogative de puissance publique” used in French administrative law.²¹⁵ This notion implies that certain entities may be endowed with “special powers”, not normally given to corporations. It is also a general

²¹³ D. Mullan, “Administrative Law at the Margins” in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 134 at 160 [Mullan, “Margins”].

²¹⁴ D. Mullan & D. Harrington, “The *Charter* and Administrative Decision-Making: The Dampening Effects of *Blencoe*” (2002) 27 *Queen’s L.J.* 879 at 893.

²¹⁵ See R. Chapus, *Droit Administratif Général*, vol. 1, 6th ed. (Paris: Montchrétien, 1991) at 3.

characteristic of public power, and thus a founding rationale for the definition of administrative law. In this respect, it is based on the premise that administrative power can be characterised by its capacity to impose its will unilaterally on private individuals without their consent, i.e. granting and withdrawal of liquor licences. Thus, it need not obtain the licensee's consent in order to avail itself of such a right. The notion of "powers more extensive than a natural person" characterizes not only the powers of select administrative authorities, but also of the entire governmental apparatus, which in contrast to private law contractual relationships, is capable of imposing its decisions on individuals regardless of their consent. Interpreting it as a specific pre-condition for the application for the *Charter* would undermine s. 32(1), which provides that the *Charter* applies to "all matters" within the power of government.

Conclusion

The definition of administrative power to sanction constitutional rights has not received a satisfactory answer. First, neither the dissenting opinion in *Cooper* nor the unanimous judgment in *Martin* and *Laseur* addresses the issue of judicial independence. Indeed, the purpose of administrative power is to implement legislative policy, not judge its appropriateness. Thus, it remains to be determined how administrative tribunals wielding unqualified power to "apply the *Charter*" cannot be seen as exercising judicial functions requiring concomitant guarantees of judicial independence as provided in the *Judicature* provisions of the *Constitution Act, 1867*. Thus, the overall tendency regarding administrative power has illustrated an increase, to the point where the utility in distinguishing between administrative power under s. 52(1) and s. 24(1) is open to question. However, the increase in administrative power under the *Charter* implies reassessing the inapplicability of the *Charter* to private action and general policy instruments. Thus, it is open to question to what extent these limitations have implicitly been set aside in the wake of *Martin* and *Laseur*.

Second, it is not clear which institutions qualify as “administrative tribunals”. Needless to say, many institutions have administrative functions. If all of government is bound by the *Charter*, then all of it must apply the *Charter*. This implies that the power to apply the *Charter* must be differentiated and will vary. Accordingly, the power to apply the *Charter* is therefore vertically gradated within government, but also horizontally gradated between government and private authorities since the latter will generally benefit from greater discretion.

CHAPTER 3 - IMPLICATIONS OF ADMINISTRATIVE POWER UNDER THE CHARTER

If administrative tribunals cannot ignore the *Charter*, they have always been, and still are bound under the *Judicature* provisions of the *Constitution Act*, 1867. These provisions have consistently been read as limiting the powers of administrative tribunals where they conflict with those of superior courts. Thus, it is open to how the increase of powers of administrative tribunals should warrant the re-interpretation of the *Constitution Act*, 1867 so as to require a greater degree of independence.

Nevertheless, increasing the independence of administrative tribunals for the sake of balancing their responsibilities under the *Charter* would not be without its implications for tribunals as non-judicial decision-making bodies.²¹⁶ The question therefore arises as to what extent the *Constitution Act*, 1867 limits administrative power under the *Charter*, and conversely, whether the introduction of the *Charter* obliges administrative tribunals to abide by a higher degree of independence as a correlative to their new constitutional responsibilities.

In spite of their greater power to not apply legislation that is deemed inconsistent with the *Charter*, there has not been any greater standard of independence for administrative tribunals. Nevertheless, the definition of autonomous administrative power under the *Charter* has prompted a procedural transformation of administrative tribunal, requiring notice of constitutional questions to the appropriate attorney general. Traditionally, this practice was only required before courts, although it would appear that fearing the increase of power, Parliament and the legislatures have required notice of the attorney general. Third, the definition of administrative tribunals as courts of competent

²¹⁶ K.W. Wyman, "The Independence of Administrative Tribunals in an Era of Ever Expansive Independence" (2000) 14 Can. J. Admin. L. & Prac. 61.

jurisdiction has also raised uncertainty regarding the effects of administrative decisions, particularly those taken under s. 24(1) of the *Charter*.

A. INDEPENDENCE OF ADMINISTRATIVE TRIBUNALS

By definition, administrative tribunals do not benefit from guarantees of independence provided to Superior Courts pursuant to ss. 96 and following of the *Constitution Act, 1867*. In this respect, the Supreme Court of Canada has made it clear that, unlike the superior courts, administrative tribunals and agencies are said to have no inherent powers.²¹⁷ This reflects the general principle that administrative power is grounded on the specific expertise of the decision-maker,²¹⁸ but also in the terms of employment and its accountability vis-à-vis political power and hence lack of independence. Although deprived of judicial guarantees of independence, administrative power is nevertheless greater than judicial power in two respects. First, administrative authorities can choose whether they wish to impose a legal burden on individuals as provided by their powers of prosecutorial discretion.²¹⁹ Second, as part of the decision-making process administrative tribunals wield much greater powers than courts because they may appeal administrative decisions, as opposed to act as mere agents of review.

As a result, administrative tribunals benefit from similar superior court powers and responsibilities. Functionally, the designation of administrative tribunals as “courts of record” has carried an automatic power to deal with contempt in the face of the tribunal,²²⁰ although administrative tribunals generally do not follow the same procedure as courts (standing, notification of the Attorney General...).²²¹ Thus, courts and

²¹⁷ *Canadian Pacific Airlines v. Canadian Airline Pilots Association*, [1993] 3 S.C.R. 724.

²¹⁸ J. M. Landis, *The Administrative Process* (New Haven, Conn.: Yale University Press, 1939).

²¹⁹ *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372.

²²⁰ *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 [*Chrysler*].

²²¹ See generally N.R. Finkelstein & B.M. Rogers, *Administrative Tribunals and the Charter* (Toronto: Carswell, 1990).

administrative tribunals should be distinguished from one another not because the former exercises judicial functions that are more “true” than administrative tribunals, but because they provide different guarantees and therefore have different uses and must be protected from abuse.²²² However, the legal status of administrative tribunals, aside from those that do not encroach on superior court functions, have not, until recently, been a matter of constitutional relevance. While the Courts have resisted requiring greater independence of administrative tribunals, there have been many calls to the contrary, and it is difficult to isolate these calls from the increased in administrative power under the *Charter*.

1. Judicial Resistance to the Independence of Administrative Tribunals

In two rulings, 2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*²²³ and *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*,²²⁴ the Supreme Court would appear, at first glance, to provide contradictory positions on the independence of administrative tribunals. In the first case, the Court ruled that a decision canceling a license was biased, whereas in the second not. Such bias arose not from the behavior of any particular member of the Régie, but from its organisation. Indeed, both boards had similar functions and benefited from far less independence than superior courts. However, both decisions confirm the that administrative tribunals, unlike courts, need not be structured like superior courts, and that their independence, even in the province of Quebec which has legislation requiring the independence of administrative tribunals exercising “quasi-judicial functions”, will vary according to the function.

In Quebec, the independence of administrative tribunals is guaranteed by the Quebec *Charter*, although the Courts have given much leeway as to how administrative tribunals are to be structured. In *Régie des permis d'alcool*, the Supreme Court ruled that a Quebec administrative tribunal exercising “quasi-judicial” functions must comply with

²²² L.L. Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harv. L. Rev. 353.

²²³ [1996] 3 S.C.R. 919 [*Quebec (Régie)*].

²²⁴ [2001] 2 S.C.R. 781 [*Ocean Port*].

independence set out in s. 23 of the Quebec *Charter of Rights and Freedoms*. However, the Court has not interpreted this provision as requiring that administrative tribunals be designed like “court-like” bodies. Thus, in this case, in spite of the important apprehension of lack of independence, the Court ruled that the structure of the tribunal need not be spelled out in its empowering statute and could be determined by regulation. Thus, the Court provided considerable leeway to the province, in spite of requirements in the Quebec *Charter*.

However, the Court ruled that having regard to s. 23 but was also common law principles of natural justice, the Régie’s decision was biased. Indeed, a member of the Régie could take part in each step of the process and that there was no separation of powers between investigation and adjudication. The Court even stated that the fact that the legislation authorized a reasonable perception of bias did not vitiate the Act or its regulations. This was an organizational problem that did not require the invalidation of the Act or its regulations. There was no violation of independence because members of the Régie’s board are appointed for a fixed term and can only be dismissed with reason. In addition, in spite of the numerous points of contact between the Régie and the executive, there was no violation of the requirement of independence.

In *Ocean Port Hotel*, the Supreme Court unanimously ruled that that the common law requirement of independence could be ousted by clear statutory language, thus concluding that there is no unwritten constitutional principle requiring administrative independence. In this case, a liquor licensee had been penalised under the *Liquor Control and Licensing Act*. In applying to review the decision, the licensee argued that the Board lacked the sufficient independence, although the problem that arose was that British Columbia does not have a *Charter* of rights guaranteeing tribunal independence and impartiality. The only avenue was unwritten principles, not common law principles of independence and impartiality, but those of constitutional nature since the purpose of the attack was to invalidate the *Act*. Thus, the plaintiff argued that the Board lacked independence using the ratio in *Reference re Remuneration of Judges of the Province of*

Prince Edward Island,²²⁵ where Lamer C.J. stated that the Preamble of the *Constitution Act, 1867*, stating that Canada is to have a constitution similar to that of the United Kingdom was one of the bases for ensuring an independent judiciary in Canada.

Such lack of independence, the argument stated, was evidenced by the *Act*, which provided that the chair and members of the Board “serve at the pleasure of the Lieutenant Governor in Council”. Second, members were appointed for a one-year term and all but the chair was paid on a per diem basis. The chair could establish panels of one or three members to hear matters before the Board “as the chair considers advisable”. These arguments were accepted by the Court of Appeal, which concluded that members of the Board lacked the necessary guarantees of independence required of administrative decision makers imposing penalties and set aside the Board's decision. However, the Supreme Court ruled that although members of the Liquor Board were employed at pleasure, this did not justify invalidating legislation establishing the Board. Members could act as both investigators and adjudicators but the court found no evidence that one single person could perform these same function for the same case. Thus, as in *Régie*, there was organisational overlap between the two functions. However, contrary to its earlier ruling, the Court was not convinced that the same individual had participated in both stages of the process in the present case. Thus, there was no reasonable apprehension of bias, although this question was remitted to the Court of Appeal for consideration. In this respect, it is not possible to argue that *Régie* and *Ocean Port* are contradictory.

Thus, both cases confirm that the standard of independence required from administrative tribunals depends on “on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make”.²²⁶ However, *Ocean Port* went further by stating that the requirement of independence may be ousted by clear statutory language, which was all the more possible in the absence of any legislative requirement of independence, as in

²²⁵ [1997] 3 S.C.R. 3 [*Reference re Remuneration of Judges*].

²²⁶ *Quebec (Régie)*, *supra* 223 at 964.

Quebec. In such cases, common law principles of natural justice will have lesser legal force in assessing the independence of the agency and the validity of its decision. As the Supreme Court stated:

This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (the “Provincial Court Judges Reference”). Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges -- both in fact and perception -- by insulating them from external influence, most notably the influence of the executive.

Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.²²⁷

2. Federalism as Limit to a Constitutional Baseline of Administrative Independence

Ocean Port has been criticized by those arguing that administrative tribunals are in fact “courts”, particularly since the advent of the *Charter* and should accordingly be treated as

²²⁷ *Ocean Port*, *supra* note 224 at 794-95. This position was confirmed for Canada in *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 [*Bell Canada*].

such.²²⁸ *Ocean Port* has also been criticised by D. Mullan, who argues that requiring a greater degree of independence from administrative tribunals is key to ensuring their competence.²²⁹ In his view, the absence of any legislative requirement of independence should not impede the development of administrative independence. Mullan also argues that *Ocean Port* implies that administrative tribunals will not be required to abide by constitutional conditions of independence, which is all the more questionable since not all administrative tribunals have a policy-making function. Thus, the requirement of greater independence should not be hindered because Canada does not abide by a strict separation of powers as in the United States and Australia.

However, it is difficult to see any evidence to establish a constitutional baseline of independence, written or unwritten, for administrative tribunals not exercising superior court functions. Correlatively, this makes it difficult to put administrative tribunals on the same footing as superior courts regarding their power to sanction constitutional rights. For one, it is accepted that the framers of the *Constitution Act, 1982* sought to keep administrative and quasi-judicial independence within the respective domain of federal and provincial jurisdiction.²³⁰ As a result, the *Charter* has not been interpreted as requiring the independence of administrative tribunals. S. 7 requires a threat to “life, liberty and security of the person” and 11(d) of the *Charter* has been interpreted as applicable the ability to levy “true penal consequences”.²³¹ In addition, the common law requirement of independence, which intersects with other principles such as bias, impartiality and the right to a fair hearing, can only be effective where it concerns the exercise of statutory power, as opposed to the definition of independence in primary legislation.

²²⁸ S. Comtois, “*Ocean Port c. B.C. (Liquor Control)*: le rôle des juges dans la protection de l’indépendance quasi-judiciaire” (2000) 60 R. du B. 521.

²²⁹ D. Mullan, “*Ocean Port Hotel* and Statutory Compromises of Tribunal Independence” (2002) 9 C.L.E.L.J. 193.

²³⁰ See also the debate in *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada* 1st Session of the 32nd Parliament (Jan 27, 1981) at 46:53, where Justice Minister J. Chrétien stated that he was not willing to provide provincial bureaucracies with the same obligations as federal bureaucracies.

²³¹ *R. v. Wigglesworth*, [1987] 2 S.C.R. 541.

Another criticism of both solutions is the minimization of the disparity between provinces with legislative requirements of independence and those without. Thus, four jurisdictions in Canada are endowed with Bills of Rights alluding to a requirement of administrative independence: Quebec, Alberta and Canada. S. 23 of the Quebec *Charter of Rights and Freedoms* requires “a fair hearing by an independent and impartial tribunal” for decisions of judicial or quasi-judicial nature.²³² S. 2(e) of the *Alberta Bill of Rights* recognises the right to individual liberty, security and enjoyment of personal property and the right not to be deprived thereof except by “due process of law”.²³³ S. 2(e) of the *Canadian Bill of Rights* requires that laws “not deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations”.²³⁴ However, these provisions do not place any specific standard for the independence of administrative tribunals. Thus, unlike the judiciary provisions of the *Constitution Act, 1867*, the Quebec *Charter* is not specific as to what guarantees of independence are applicable.

Indeed, the key criticism regarding *Ocean Port* and *Régie* is that both rulings are difficult to reconcile with *Martin* and *Laseur*, which provides administrative tribunals with the power to set aside primary legislation. Such a power is difficult to reconcile with the lack of independence of administrative tribunals, and it is unlikely that it will, pending a transformation in the status of tribunal members, be of any significant effect. While it is open to debate as to whether, as a matter of policy, administrative tribunals would be enhanced by greater independence, the fact remains that the legal qualification of “administrative tribunal” has always implied a lesser degree of independence than superior courts. While greater degree of independence may be beneficial for some tribunals, this cannot be a matter of constitutional concern: until an agency encroaches on superior court power, governments may structure administrative agencies as they wish. In this respect, the introduction of the *Charter* cannot be used as an argument for a constitutional standard of independence for administrative tribunals.

²³² R.S.Q. c. C-12, s. 23.

²³³ R.S.A. 2000, c. A-14.

²³⁴ *Supra* note 24, s. 2(e).

B. NOTIFICATION OF THE ATTORNEY GENERAL BEFORE ADMINISTRATIVE TRIBUNALS

In addition to calls for heightened independence of administrative tribunals, the definition of autonomous power to “apply the *Charter*” has prompted important legislative amendments to administrative procedure, namely the requirement of notice to the attorney general of constitutional questions. The requirement of notice has traditionally been reversed for the judicial level,²³⁵ although the redefinition of administrative power under the *Charter* has prompted the “judicialisation” of administrative procedure. Essentially, notice to the attorney general does not favor individual rights, particularly when individuals are contesting not the validity of legislation but cases where it has been improperly applied. In this respect, such amendments have only been necessary in light of the uncertain definition of administrative power under the *Charter* and reflect legislative uneasiness existing solutions of the matter.

There have been variable reactions in each jurisdiction regarding notice requirements, essentially three. Ontario, British Columbia and Nova Scotia require notice of constitutional issues before administrative tribunals, just as in courts.²³⁶ Notice is equally necessary before federal administrative tribunals.²³⁷ However, the case of British Columbia is the most elaborate. S. 46 of its *Constitutional Question Act* provides: “If a constitutional question over which the tribunal has jurisdiction is raised in a tribunal proceeding, the party who raises the question must give notice in compliance with section

²³⁵ See below 2. Procedural Autonomy: Notification of the Attorney General.

²³⁶ For Ontario, see s. 109(6) of the *Ontario Courts of Justice Act*. Following 1994 amendments, this provision states that notice applies to proceedings before boards and tribunals as well as to court proceedings. For Nova Scotia, see *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, s.10 (1) (a), which defines “court” as including “a judge of the provincial court or an administrative tribunal.” [Nova Scotia, “Constitutional Questions Act”].

²³⁷ S. 57(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [*Federal Courts Act*], s. 1., R.S. 1990 c. 8, s. 19.

8 of the *Constitutional Question Act*.²³⁸ However, the *Administrative Tribunals Act* adds a further distinction between three types of tribunal powers.²³⁹ The general rule in s. 44 provides for no constitutional jurisdiction. This applies to most tribunals, acknowledging that these have expertise limited to their core areas of responsibility. In the words of Geoff Plant, “The intent is that, for the most part, these issues are to be resolved through the courts, allowing tribunals to focus on the work they do best.”²⁴⁰ Exceptionally, the constitutional jurisdiction of administrative tribunals can be limited: i.e. no *Charter* jurisdiction (s. 45), or full constitutional jurisdiction (s. 43). Thus, the *Administrative Tribunals Act* has consecrated the distinction between tribunals that can apply the *Charter* and those that cannot.

However, all other jurisdictions direct notice requirements to courts, or their interpretation favors such a restriction. For instance, Alberta’s *Judicature Act* does not specify which institutions require notice for constitutional questions, although the Act exclusively regulates the powers of the Court of Queen’s Bench and those of the Court of Appeal.²⁴¹ In Quebec, it is not clear whether notice requirements apply for disputes administrative tribunals. Quebec’s Code of Civil Procedure generally applies to “judicial tribunals”, except where legislation specifies to the contrary. Nevertheless, art. 56(1) of the Quebec *Charter* defines “tribunal” as a person or organ exercising “quasi-judicial”

²³⁸ *Constitutional Question Act*, R.S.B.C. 1996, c. 63 s. 8 [British Columbia, “Constitutional Question Act”].

²³⁹ *Administrative Tribunals Act*, S.B.C. 2004 C. 45.

²⁴⁰ The Honourable Geoff Plant, QC, Attorney General of British Columbia, “Modernizing BC’s administrative justice system” in *BarTalk* (British Columbia Branch of the Canadian Bar Association, August 2004).

²⁴¹ *Judicature Act*, R.S.A. 2000, c. J-2 [Alberta, “Judicature Act”]. S. 57 of Newfoundland’s *Judicature Act* does not specify whether notice applies to administrative tribunals, although s. 57(6) only refers to the discretion of “courts” to order notice when appropriate, *Judicature Act*, 1986, R.S.N. 1990, c. J-4, s. 57 [Newfoundland, “Judicature Act”]; s. 22(3) of New Brunswick’s *Judicature Act* provides for notice of constitutional question before trial judge or court of appeal, R.S.N.B. 1973, c. J-2; s. 58(1) of Nunavut’s *Judicature Act*, Applies only to the constitutional validity of “enactment of Nunavut” in “court proceeding”, S.N.W.T. 1998 c. 34, s.1 [Nunavut, “Judicature Act”]; s. 7(2) of Manitoba’s *Constitutional Questions Act* refers to “cause, matter or other proceeding” although nothing specifies whether the Act applies to administrative agencies. C.C.S.M. c. C180, s. 3 [Manitoba, “Constitutional Questions Act”]; P.E.I.’s *Supreme Court Act* does not specify whether notice is required before administrative tribunals, although s. 41(3) does refer to the Attorney General’s right to adduce evidence “before the court”. “Court” is defined in -s. 1(a) of the Act as the “Supreme Court of Prince Edward Island”. , R.S.P.E.I. 1988, c. S-10, s. 41 [P.E.I., “Supreme Court Act”]; Saskatchewan’s *Constitutional Questions Act* refers to constitutional questions in a “court of Saskatchewan”, R.S.S. 1978, c. C-29, s 8 [Saskatchewan, “Constitutional Questions Act”].

functions. D. Pinard argues that if administrative tribunals have the power to decide constitutional questions, which they should, than notice requirements should bind them as well.²⁴² This is also the case of Hogg, who also argues that notice requirements will have to be amended to allow for notice in administrative tribunals.²⁴³

In this author's opinion, notice requirements before administrative tribunals are not necessary, especially since the effects of administrative interpretations under the *Charter* do not extend to third parties, and the general purpose of notification is the protection of third party interests. In this respect, as representative of the public interest, notice to the attorney general would only justify the extension of the effects of the ruling to the general public, although this is unlikely given the absence of any constitutional standard of independence for members of administrative tribunals not exercising superior court functions.

C. EFFECT OF ADMINISTRATIVE DECISIONS

The Supreme Court has stressed that administrative power exercised under s. 52(1) does not establish a binding judicial settlement.²⁴⁴ However, is this also the case under s. 24(1)? The "judicialisation" of administrative tribunals thus raises questions as to the subsequent availability of judicial remedies following a determination by an administrative authority qualifying as a "court of competent jurisdiction" under s. 24(1). More specifically, because the administrative process and judicial review are described as "alternate remedies", the question arises as to the implications of the doctrine of *res judicata* on the availability of review.

²⁴² D. Pinard, "L'exigence d'avis préalable au procureur général prévue à l'article 95 du Code de procédure civile" (1990) 50 R. du B. 629 at 663-64 [Pinard, "Avis préalable"].

²⁴³ See Hogg, "Remedial Power", *supra* note 107 at 162.

²⁴⁴ *Supra* note 100.

Indeed, administrative tribunals do not constitute an alternate or cheaper process in relation to the judicial system, nor do they constitute an autonomous jurisdictional order. Nevertheless, the logical extension of qualifying administrative tribunals with remedial power as “courts of competent jurisdiction” is the extension of the doctrines of *res judicata* and estoppel to administrative decisions, which raises the question as to the effects of administrative tribunal decisions taken under s. 24(1).

1. *Res Judicata* and the Validity of Administrative Decisions

In *Weber*, the Supreme Court distinguished between three models of adjudication that could be adopted in statutes in order to delineate the relationship between administrative tribunals and courts: (1) the concurrent model, which would allow an individual to make a claim in court because the claims are based on the common law and the *Charter*, not the collective agreement; (2) the model of overlapping jurisdiction: matters that go beyond the parameters of the collective agreement should go to court (i.e. trespass, privacy etc); (3) the exclusive model: this test asks what the “essential character of the dispute” is. This model does not imply exclusively one forum or the other, but one forum at a time per dispute. Thus, under this model, the dispute would begin with the arbitrator, whose errors are subject to judicial review. In *Weber*, the Court adopted the third model, although it later conceded that this solution was fact specific, and that the adoption of either model would be legislatively possible.²⁴⁵

The dissenting opinion of Iacobucci, LaForest and Sopinka JJ. in *Weber v. Ontario Hydro* emphasised the limited power of administrative tribunals and rejected their power to grant remedies under s. 24(1) and therefore that administrative tribunals are not “courts of competent jurisdiction” for the purposes of s. 24(1) of the *Charter*. The opinion gave convincing arguments for not allowing for the qualification of administrative tribunals as “courts”. In addition to providing no appropriate procedure for attorney general

²⁴⁵ See *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (A.G.)*, 2004 SCC 39. The dissenting opinion of Arbour and Bastarache JJ. stated that labour arbitrators necessarily have exclusive jurisdiction.

notification, the opinion stated: “Courts must decide cases according to the law and are bound by *stare decisis*. By contrast, tribunals are not so constrained.”²⁴⁶ However, this is not entirely correct: administrative tribunals are of course bound by judicial interpretations of the law, although their interpretations do not bind the courts’ as would a precedent.

Thus a general question arises: do administrative tribunal decisions under s. 24(1) qualify as *res judicata*? Generally, a *res judicata* is defined as a final and conclusive judicial decision pronounced by a court entertaining jurisdiction over both the parties and the subject matter such that, appeal and review mechanisms set aside, the matter cannot be re-litigated between the same parties or their privies.²⁴⁷ However, scholarship and the judiciary have suffered from a recurring tendency of amalgamating *res judicata* and the doctrine of estoppel on the one hand, with the principle of validity of administrative acts on the other. Both these notions are distinct and entail different consequences, particularly because a final and conclusive determination by an administrative authority has never prevented it from being reviewed in court.²⁴⁸

Normally, in applying *res judicata* only to courts, the condition as to whether or not courts are exercising judicial functions is automatically fulfilled. However, asking whether an administrative authority’s decision is a *res judicata* implies determining whether it is exercising a judicial function, a quasi-judicial function or a purely administrative function. Moreover, determining an administrative authority’s function was recognised as unworkable. When determining a right to “natural justice” and a duty to “hear the other side”, the landmark ruling in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*,²⁴⁹ the Supreme Court, set aside the function test for a pragmatic approach. For many years, judges had unsuccessfully sought to determine the scope of principles such as *audi alteram partem* by qualifying the institution in question

²⁴⁶ *Weber*, at 940.

²⁴⁷ D.J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000).

²⁴⁸ A. Rubinstein, *Jurisdiction and Illegality* (Oxford: Clarendon Press, 1965) at 26-9.

²⁴⁹ [1979] 1 S.C.R. 311 [*Nicholson*].

as either judicial or quasi-judicial, which earned the test the title of “favorite fallacy” of administrative lawyers.²⁵⁰

Indeed, to characterize a determination of an administrative tribunal as a “*res judicata*” would invite a court to appeal the matter, rather than simply review its legality. Moreover, it is generally established that once a decision is made, it is generally irrevocable and exhausts the powers of the authority in question. The principle of finality applies not only to statutory tribunals but to all administrative authorities. Thus, when an administrative authority makes a determination, it is immediately binding regardless of any judicial validation, not by the doctrine of estoppel or *res judicata* but simply because it is a valid exercise of statutory or prerogative power.²⁵¹ Thus, a determination made by a tribunal is no less final than one made by a non-judicial authority: each may be reviewed where they were made invalidly.

However, the validity of administrative decisions and *res judicata* are often confused. In *Ayangma v. Prince Edward Island*,²⁵² an individual filed a complaint with the *Human Rights Commission*. Not satisfied with the result, he applied for judicial review alleging *Charter* violations. The P.E.I. Government, in seeking to bar the application, alleged that he was barred by *res judicata* because the issue had been decided conclusively by the Human Rights Commission. Nevertheless, the court allowed the application, stating that judicial review on *Charter* grounds and a complaint under *Human Rights Act* before the Commission are not alternative causes of action because in this case, the Commission was not a “court of competent jurisdiction”, nor did it have the power to apply the *Charter* based on s. 52(1).²⁵³ However, it would seem that had the Commission had such powers (which under *Martin* and *Laseur* most, if not all administrative tribunals now have),²⁵⁴ the applicant would have been barred from judicial review.

²⁵⁰ Wade & Forsyth, *supra* note 14 at 484

²⁵¹ *Ibid.* at 249-50.

²⁵² *Ayangma v. Prince Edward Island* (1998), 168 Nfld. & P.E.I.R. 1.

²⁵³ *Moore v. British Columbia*, (1988), 50 D.L.R. (4th) 29 (B.C.C.A.).

²⁵⁴ *Supra* note 98.

In the United States, the transposition of the doctrine of *res judicata* to administrative tribunals has caused much confusion. For instance, the U.S. Supreme Court has held “When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts should not have hesitated to apply *res judicata* to enforce repose.”²⁵⁵ Conversely, it held that “judicially unreviewed” claims of age discrimination by an administrative tribunal are not precluded by *res judicata* from judicial review.²⁵⁶ These positions are difficult to follow because the fact that an issue was not determined in administrative proceedings should not automatically justify judicial review, just as the fact that the issue was determined in administrative proceedings should not preclude its exercise.

2. Extension of Issue Estoppel to Administrative Decisions

In spite of the important distinction between *res judicata* and the validity of administrative decisions, the Supreme Court ruled in *Danyluk v. Ainsworth Technologies* that the doctrine of estoppel applies to administrative tribunals exercising judicial or “quasi-judicial functions”.²⁵⁷ As with the confusion between *res judicata* and the validity of administrative decisions, the extension of the sister-doctrine of *res judicata*, issue estoppel, carries many interrogations, in particular with regard to administrative tribunals qualifying as “courts of competent jurisdiction” under s. 24(1).

The issue in *Danyluk* was whether this doctrine could prevent an employee from litigating in court a decision taken by an employment standards officer under Ontario employment standards legislation concerning the payment of wages to a dismissed employee. The legislation provided it did not affect the employee’s common law rights. The employee had initiated a claim under the statutory scheme. However, unsatisfied with the officer’s determination, the employee decided to immediately commence an

²⁵⁵ *United States v. Utah Construction & Mining*, 384 U.S. 394, 422 (1966).

²⁵⁶ *Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 108 (1991).

²⁵⁷ [2001] 2 S.C.R. 460 [*Danyluk*].

action in court for wrongful dismissal, thereby forgoing a right to appeal the decision of the officer before the director of employment standards. This prompted a motion by the employer to have the claim for unpaid wages struck out on the basis of issue estoppel.

Until *Danyluk*, it was unclear to what extent the doctrine of estoppel could play a role in public law relations.²⁵⁸ However, in overruling the Ontario Court of Appeal, Binnie J. stated that the doctrine of estoppel does have a role to play with regard to administrative tribunals exercising judicial or “quasi-judicial functions” and also that even though issue estoppel requires identity of parties, issues and a final judicial determination on the matter, courts nevertheless retain their discretion in granting motions to stay proceedings even when the three conditions are satisfied: (1) the availability of an alternate means of redress under the statutory scheme; (2) the availability of an appeal; (3) the fairness of the administrative process, the expertise of the decision-maker and also the potential injustice to the individual seeking judicial redress. As a final and most important factor, Binnie J. stated: “the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice.”²⁵⁹

Thus, Binnie J. recognized that the officer in question was exercising a judicial function because of the existence of “adjudicative powers”, and that such powers had to be exercised in a “judicial manner”. He also agreed with the Court of Appeal’s finding on the finality. In his view, the determination of the officer was final because the employee had no right of appeal, but merely a discretionary internal review procedure. The finding of no right to appeal was based on the statutory discretion of the Director, who could decide as to whether or not an appeal should be granted. Binnie J. therefore did not characterize this as an appeal, even though the act provided that, should it be granted, it would entail a *de novo* consideration of the merits of the claim.²⁶⁰ Nevertheless, he concluded that although the preconditions for estoppel had been met, judicial discretion

²⁵⁸ Mullan, *Administrative Law*, *supra* note 10 at 380.

²⁵⁹ *Ibid.* at 498, per Binnie J.

²⁶⁰ *Ibid.* at 492.

should have been exercised, as opposed to being granted automatically upon fulfilment of the listed preconditions, and thereby avoiding committing an injustice to the employee.

The application of the doctrine of issue estoppel in the context of administrative law relations demonstrates the need for judicial respect for the administrative process, and the necessity for judges to give way to the expertise of administrative authorities before intervening. However, as an independent doctrine, it is doubtful that it has contributed to the development of the law. Indeed, the main consequence in confusing *res judicata* and estoppel with the principle of validity of administrative acts is that judges must now return to the search for criteria for judicial and quasi-judicial functions.

In *Danyluk*, Binnie J. ruled that the administrative officer was exercising a judicial function because of adjudicative powers, and that such powers had to be exercised in a “judicial manner”. However, it is very difficult to see how an administrative officer is making a “judicial determination” simply by virtue of adjudicative powers exercised in a “judicial manner”. Thus, in extending estoppel to administrative tribunals, the Supreme Court has revived one of the most intractable questions in administrative law: the impossible distinction between judicial and non-judicial functions. It is therefore unfortunate that this interrogation will be a determinant step considering whether to allow a case to go through in court, especially when one remembers that it is not a determinant condition and the limiting factor hinge on a balance of probabilities and thus judicial discretion.²⁶¹

The extension of the doctrine of estoppel to administrative tribunals and other administrative authorities can also be seen as an unnecessary addition to the law. Initially, the notions of *res judicata* and estoppel were proper to “final judicial determinations”, not those of administrative authorities. The Supreme Court, however, has provided authority to the effect that the doctrines had been applied not only to courts but also to administrative agencies, and this as early as the mid 1800s.²⁶² However, the examples

²⁶¹ Mullan, *Administrative Law*, *supra* note 10 at 472.

²⁶² *Danyluk*, *supra* note 257 at 474. See also Lange, *supra* note 247 at 94 et seq.

cited, just as the Supreme Court's application of the doctrine of estoppel, demonstrate an amalgamation between the principle of finality of statutory decisions and acts with the principles of *res judicata* and estoppel, and therefore with the general foundations of judicial control.

Indeed, the extension of issue estoppel to administrative tribunals in *Danyluk* confirms the exhaustion rule, which has never been rigid, but has taken into consideration, as did Binnie J., the particular circumstances of each individual, such as the potential injustice in having to litigate through tribunals before going to court.²⁶³ However, the fulfilment of finality in the doctrine of estoppel is a necessary condition prior the consideration of the particular circumstances of each case; it cannot suffer from any exception. In order to fulfil this condition, Binnie J. was obliged to characterize the determination of the administrative officer as "final", despite the availability of means for a *de novo* consideration of the merits by a superior. Thus, Binnie J. characterized this possibility not as an appeal, but as a means of review because it was at the discretion of the Director. However, no discretion is absolute and in any case, the denial of an appeal is itself a decision on the merits. Moreover, if the determinations of administrative authorities are final, in the sense that they are generally irrevocable, regardless of the exercise of appeal, the fact that a determination has been made does not automatically make it "final" until all means of recourse have been exercised.

Conclusion

The distinction between the effects of administrative and judicial pronouncements under the *Charter* is not satisfactory. At the outset, administrative tribunal decisions are by definition not *res judicata*. However, while administrative tribunals can be "courts of

²⁶³ See *Harelkin*, *supra* note 114. On the discretionary nature of the exhaustion principle, particularly in constitutional matters, see Jaffe, *supra* note 116 at 424.

competent jurisdiction”, their rulings on the *Charter* are not *res judicata* as those of courts, although administrative tribunals are now subject to issue estoppel, as courts, when “acting judicially”. Thus, it would be possible for an administrative tribunal decision as a “court of competent jurisdiction” to be subject to estoppel, thus precluded from review, and this in the absence of any privative clause. Nevertheless, it is unlikely that issue estoppel prevents individuals from applying for review simply because an administrative tribunal qualified as a “court of competent jurisdiction”, although the added confusion generated by the unnecessary extension of issue estoppel and the persisting debate as to whether administrative tribunals are “courts of competent jurisdiction” is enough to warrant caution, as evidenced by benign errors already made in Canada, and those that have already tainted American administrative law.

Next, the issue of administrative power has only been answered from the perspective of administrative tribunals, as opposed to government and administrative power as a whole. The question is why the *Charter* should only be applied by administrative tribunals, as opposed to all levels of government. Indeed, while *Martin* and *Laseur* has brought with it academic acclaim,²⁶⁴ it does not address the powers of other administrative authorities such as Ministers and individuals working under his or her authority.²⁶⁵ Last, it is not clear what is meant by the distinction between administrative tribunals that can and cannot apply the law, and administrative tribunals that can or cannot apply the *Charter*. Ultimately, since both the law and the *Charter* as said to flow in unison, this distinction is of limited substantive implication. However, it is even more obscure how legislation may withdraw power to apply the *Charter* without violating the *Charter* itself; since neither Parliament nor the legislature may violate the *Charter*, neither can such a power be delegated.

²⁶⁴ E.g. Roach, *Remedies*, *supra* note 37 at 6.200; Special Issue Administrative Law Newsletter of the Canadian Bar Association: *Administrative Law* (Ontario Branch of the Canadian Bar Association) 12:2 (March 2004); L. Smith, “Administrative Tribunals as Constitutional Decision-Makers” (2004) 17 Can. J. Admin. L. & Prac. 113.

²⁶⁵ *Residential Tenancies Act*, *supra* note 58.

CHAPTER 4 - LEGITIMACY OF ADMINISTRATIVE POWER UNDER THE CHARTER

The definition of administrative power under the Constitution has polarised legal opinion. Authors such as Hogg, Dyzenhaus, Pinard, Brun, and Evans favour the granting of powers to administrative authorities to sanction *Charter* rights, including in instances where the legislative powers of administrative tribunals clearly conflict therewith.²⁶⁶ This school argues that it is more democratic to allow administrative tribunals to declare legislation unconstitutional than to provide the courts with such a monopoly, as argued by the minority in *Cooper*. Others such as Beaudoin, Pépin and Garant argue against providing powers to administrative tribunals to sanction *Charter* rights, generally basing themselves on similar arguments advanced by Lamer C.J. in *Cooper*.²⁶⁷ Some have been more nuanced. Professor Côté writes: “Au point de vue fonctionnel, les tribunaux administratifs ne peuvent exercer leur fonction d'interprétation et d'application des lois et règlements tout en ignorant la teneur de la *Charte*: le caractère systémique du droit le leur interdit.”²⁶⁸ Côté continues: as part of the fabric of government, administrative tribunals are bound by the *Charter* under s. 32(1), they cannot ignore it. In his view, this does not

²⁶⁶ D. Pinard, « Le pouvoir des tribunaux administratifs québécois de refuser de donner effet à des textes qu'ils jugent inconstitutionnels » (1987) 33 McGill L.J. 170; H. Brun, “La compétence des tribunaux administratifs en matière de *Charte*” (1989) 30 C. de D. 221; Hogg, *Constitutional Law*, *supra* note 9 at 34.2(g); D. Dyzenhaus, “Fundamental Values and Administrative Law” (2002) 27 Queen's L.J. 445, describing the majority opinion as a “formalist view of democracy”; J. Evans, “Administrative Tribunals and *Charter* Challenges” (1989) 2 Can. J. Admin. L. & Prac. 13 [Evans, “Tribunals”]. See also A. J. Roman, “Case Comment: *Cooper v. Canada (Human Rights Commission)*” (1997) 43 Admin. L.R. (2d) 243 criticizing the overall lack of clarity concerning administrative power to deal with *Charter* issues.

²⁶⁷ G.-A. Beaudoin, “Les tribunaux administratifs et la *Charte* canadienne des droits et libertés” (1998) 61 Sask. L. Rev. 277; G. Pépin, “La compétence des tribunaux administratifs de décider de la constitutionnalité d'une loi, notamment de sa compatibilité avec la *Charte* canadienne des droits et libertés” (1991) 16 Queen's L.J. 113 at 149-50; P. Garant, “Qui contrôle la constitutionnalité des lois, les cours supérieures ou les tribunaux administratifs?” (1989) 30 C. de D. 189; G. Pépin, “Le compétence des cours inférieures et des tribunaux administratifs de stériliser, pour cause d'invalidité ou d'ineffectivité, les textes législatifs et réglementaires qu'ils ont mission d'appliquer” (1987) 47 R. du B. 509; G. Pépin, “La compétence du Tribunal du travail de juger un loi ineffective (inopérante)” (1988) 48 R. du B. 125; G. Pépin, “Le tribunal administratif et la constitutionnalité des lois: l'arrêt *Tétreault-Gadoury*” (1988) 48 R. du B. 827.

²⁶⁸ P.-A. Côté, “La recevabilité des arguments fondés sur les *Chartes* des droits devant les tribunaux administratifs” (1989) 49 R. du B. 455 at 456.

mean that administrative tribunals can set aside legislation if they believe it contrary to the *Charter*, but that they must interpret taking into account *Charter* principles, which are necessary to the proper interpretation of their legislative powers.

If administrative authorities must to give effect to the Constitution, but are limited by their lack of independence, the question arises as to how these two principles can be reconciled. This chapter argues that a rational definition of administrative powers under the *Charter* has been difficult to achieve, particularly given the debate regarding the role of the presumption of constitutionality. This notion affects the scope of administrative power in two ways. First, by setting a threshold for distinguishing between interpretation and remedying legislation; second, by holding that primary legislation cannot allow for the violation of the *Charter* and thus delegated power that infringes the *Charter* is for all practical purposes *ultra vires* the empowering *act*, and thus does not raise any problem of legitimacy.

Indeed, it is important to note that no mention is made of the nature of legislation at hand, such that the *Charter* has indiscriminately been applied to all forms of legislation, regardless of its nature.²⁶⁹ However, the legitimacy of administrative power under the *Charter* is only controversial with regard to primary legislation; controlling the validity of secondary and tertiary legislation does not raise any legitimacy issues for administrative tribunals. *Martin* and *Laseur* ruled on the compatibility of primary legislation and a regulation with the *Charter*, but not all past cases concerned such legislation.²⁷⁰ Until now the debate has been whether administrative tribunals have the power to determine the “constitutional validity of legislation”, regardless of its nature.²⁷¹ This question does not distinguish between the various sources of law that may violate individual rights (administrative decisions, regulations, primary legislation), the validity of which represent different levels of legitimacy. It also reflects the static view of law that

²⁶⁹ N. Lambert, “Administrative Tribunals and Constitutional Rights in *Martin/Laseur*: If Applying the *Charter* is the Answer, What is the Question?” *Administrative Law* (Ontario Branch of the Canadian Bar Association) 12:2 (March 2004) 13.

²⁷⁰ *Douglas College*, *supra* note 87.

²⁷¹ Evans, “Tribunals”, *supra* note 266.

distinguishes between the validity of laws and the process of creating law and therefore does not see law as a hierarchical structure.

Thus, because primary legislation cannot allow for the violation of the Constitution, (without itself being unconstitutional) secondary and tertiary legislation that is “unconstitutional” is nothing more than *ultra vires* its empowering instrument. Indeed, the Canadian Constitution, aside from residual prerogative, does not provide administrative authorities with autonomous regulatory powers. This can only mean that the effects of the *Charter*, as far as administrative action is concerned, “flow through” primary legislation rather than derive directly from the Constitution.²⁷² As a result, regulations, collective agreements or administrative decisions that violate individual rights are at least *ultra vires* their empowering instrument.²⁷³ Setting aside such secondary and tertiary legislation should therefore not pose any legitimacy issues for administrative tribunals.

These two factors are related to the problem of understanding the relation between the supremacy clause – s. 52(1) of the *Constitution Act, 1982*, and the remedial clause of the *Charter* – s. 24(1). There has been much debate on the availability of remedies under these two respective provisions, although it hides a more fundamental issue. For some, the *Charter* is essentially of remedial nature and would therefore distinguish itself from the process of statutory interpretation. This is reflected in the opposing views on s. 24(1), which for some, should be maximised.²⁷⁴ For others, the *Charter* is of greater relevance in the process of statutory interpretation. This debate has consequences as to the legitimacy of administrative power which can be perceived as remedial or interpretative.

²⁷² See Hogg, *Constitutional Law*, *supra* note 9 at 34.2(c).

²⁷³ *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 [*Slaight*].

²⁷⁴ See Roach, *Remedies*, *supra* note 37 at 6.10; R. Langlois, “A la défense de l’article 24” in G.A. Beaudoin ed., *Vues canadiennes et européennes des droits et libertés: actes des journées strasbourgeoises* (Cowansville, Qc: Yvon Blais, 1988) 231; G. Otis, “Que reste-t-il de l’article 24 après l’affaire *Schachter*?” (1993) 72 Can. Bar Rev. 162.

A. NATURE OF READING-IN AND READING-DOWN AS INTERPRETATION OR CONSTITUTIONAL REMEDIES

In *Martin* and *Laseur*, Gonthier J. specified that the powers of administrative tribunals to issue constitutional remedies are limited and do not include the power to issue a “formal declaration of invalidity”.²⁷⁵ However, it is difficult to find any such limits in his opinion, and to see how the power to go against the wording of primary legislation should not already be far enough. Indeed, the caveat of not allowing administrative tribunals to provide “formal declarations of invalidity” while providing them with the power to sanction *Charter* rights, independently of the validity of legislation is in sum allowing administrative tribunals to provide constitutional exemptions, something even superior courts have not yet allowed themselves to provide.

If reading-in and reading-down are conceived as “remedies to unconstitutional” legislation, it is difficult to allow administrative tribunals, which do not benefit from any guarantees of independence as do superior courts, to extend or restrict the reach of legislation, particularly primary legislation voted by Parliament and the legislatures. Conversely, this approach makes it difficult to draw any limits on the powers of administrative tribunals. As some have argued: “There seems to be no convincing reason in principle to think that an administrative tribunal, which is otherwise properly authorised to consider the validity of a statutory provision, should not have resort to the full range of remedial powers described in *Schachter*. Reading down, reading in, and the like are of no more legal consequence than a simple finding of invalidity.”²⁷⁶

Nevertheless, if reading-in and reading-down are conceived of part of the process of interpretation then it is easier to reconcile the powers of administrative tribunals under the *Charter* with the requirement of judicial independence. Indeed, this conceptual debate is the principle factor prompting uncertainty in administrative tribunal powers. Thus, the

²⁷⁵ La Forest J. in *Cuddy Chicks*, *supra* note 88 at 18; *Martin* and *Laseur*, *supra* note 98 at 530.

²⁷⁶ R.G. Richards, “*Charter* Procedure in Administrative Cases: General Principles and Concerns” (1993-1994) 7 Can. J. Admin. L. & Prac. 135 at 141. See *Schachter*, *infra* note 279.

question does not hinge on determining whether administrative tribunals can or cannot apply the *Charter*, but distinguishing providing a remedy under the *Charter*, and interpreting the law insofar as possible in accordance with the *Charter*.

1. Reading-in and Reading-down as Constitutional Remedies

The remedial approach to the power to apply the *Charter* is based on the notion that “reading-in” and “reading-down” are constitutional remedies rather than normal aspects of statutory interpretation.²⁷⁷ This is a position held by a clear majority of Canadian legal opinion: reading-in and reading-down are “remedies affecting legislation”.²⁷⁸ Thus, Canadian courts and academics have defined the process of “reading-in” as “extending the legislation’s reach”²⁷⁹ or even as “adding new words to a statute to remove a constitutional defect.”²⁸⁰ In this respect, “reading-in” is qualified as an exception to the rule against reconstruction, which provides that judges can only amend statutes by subtraction.²⁸¹ Thus, by isolating the *Charter* from the process of statutory interpretation, this view sees the *Charter* as providing “free-standing legal obligations”, as opposed to interpretative constructs that form part of the process of interpretation. Thus, *Charter* techniques for interpreting a statute are “constitutional remedies” used in order to correct an otherwise unconstitutional statute. Thus, when a law is underinclusive or overinclusive, courts can declare it unconstitutional by virtue of s. 52 (1) and will read it in or read it down to remedy the situation.

This was the view of the majority in *Osbourne v. Canada (Treasury Board)*.²⁸² In this case, the question was raised as to the constitutionality of legislation prohibiting certain

²⁷⁷ See e.g. R. Tassé, “Application of the *Charter* of Rights and Freedoms (Sections 30-33 and 52)” in Beaudoin & Ratushny, *supra* note 304, 65 at 114-15; Gibson, *General Principles*, *supra* note 8 at 186-192.

²⁷⁸ See Hogg, *Constitutional Law*, *supra* note 9 at ch. 37; Roach, *Remedies* at 14.170, Tassé, *ibid.*, at 114.

²⁷⁹ *Schachter v. Canada*, [1992] 2 S.C.R. 679 [Schachter].

²⁸⁰ Hogg, *Constitutional Law*, *supra* note 9 at 37.1.

²⁸¹ *Ibid.* at 37.1(i).

²⁸² *Osbourne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 105 [Osbourne].

political activities of federal public sector employees under the *Public Service Employment Act*.²⁸³ The majority held that the *Act* was unconstitutional because it could not sustain any interpretation that would conform to the *Charter*. The majority, led by Sopinka J, with Cory and McLachlin concurring, found that reading-in and reading down constitute remedies as opposed to methods of interpretation. This was explained by the characterisation of reading-in and reading down as techniques of interpretation if relevant to the traditional attitude of judicial deference to legislatures, as prior to the *Charter*, no longer applied. As Sopinka J. stated:

It is argued that [reading down] was less of an intrusion into the legislative sphere than the remedy employed by the Court of Appeal. This submission is based on the notion that reading down of the statute to conform with the *Charter* does not involve a determination of invalidity of the impugned provisions. The fallacy in this reasoning is that, in order to determine which interpretation is consistent with the *Charter*, it is necessary to determine what aspects of the statute's operation do not conform. The latter determination is in essence an invalidation of the aspects of the statute that are found not to conform. This requires not only a finding that a *Charter* right or freedom is infringed but that it is not justified under s. 1. This so-called "reading down" of a statutory provision operates to avoid a finding of unconstitutionality. In a *Charter* case, this means not only an infringement of a right or freedom but one that is, as well, not a reasonable limit prescribed by law and justified under s. 1.²⁸⁴

This view aligns itself with that of K. Roach, as with the majority of opinion in Canada: "although interpreting a statute is not technically a remedy for a constitutional violation, it is, in a functional sense, an alternative to invalidation of a potentially unconstitutional law."²⁸⁵ Similarly, C. Rogerson argued that the *Charter* has blurred the distinction between invalidation and interpretation.²⁸⁶ However, viewing "reading-in" and "reading-down" as constitutional remedies raises the questions as to utility of distinguishing *Charter* remedies under s. 24(1) and the process of reading-in or reading-down legislation under s. 52(1), particularly in cases where individuals are seeking relief for

²⁸³ R.S.C. 1985, c. P-33.

²⁸⁴ *Osbourne*, *supra* note 282 at 277.

²⁸⁵ Roach, *Remedies*, *supra* note 37 at 14.170.

²⁸⁶ Rogerson, *supra* note 156

unlawful administrative action: legislation can alternatively be “read in” or “read down” so as to provide an individual remedy, or it can remain intact and the remedy can be provided under s. 24(1).

More importantly, the remedial approach to the *Charter* and its isolation from the process of statutory interpretation reflect the *Charter*’s novelty, although it gives rise to several objections. Hogg states that the general rule is that courts cannot reconstruct a statute. However, he states that reading-in, reading down, invalidity and severance should be seen as exceptions to the rule.²⁸⁷ Nevertheless, it is difficult to qualify “reading-in” as “adding words” to a statute, and conversely to qualify “reading-down” as severance because severing a statute is not the same as interpreting it restrictively or reading it down. Moreover, “reading-in” and “reading-down” may extend or restrict the scope of legislation, at least in a relative sense (since 1982), although it has never been the function of the judiciary, aside from pragmatically correcting drafting errors, to add words to legislation. This is confirmed by the general rule against reconstruction, which still exists under the *Charter*. As Dickson C.J. stated in the early days of the *Charter*: “It should not fall to the courts to fill in the details necessary to render legislative lacunae constitutional.”²⁸⁸ If this is true for the Supreme Court, it should be just as true for administrative tribunals. Of course, this does not mean that legislation should not be “read-in” or “read-down”, but simply that it is difficult to conceptualise reading-in and reading-down as “remedies” to legislation.

2. Reading-in and Reading-down as Statutory Interpretation

The interpretative approach to administrative power under the *Charter* is reflected in the position that “reading-in” and “reading-down” are normal aspects of statutory interpretation and are not the result of the unconstitutionality of legislation. These

²⁸⁷ Hogg, *Constitutional Law* at 37.1(i).

²⁸⁸ *Hunter v. Southam*, [1984] 2 S.C.R. 145 [*Southam*].

“remedies” are therefore the direct result of s. 52(1) of the *Constitution Act, 1982* and are not connected with the exercise of any “judicial” or “quasi-judicial” function.

In *Osbourne* Wilson J., argued that reading-in and reading-down were forms of interpretation, rather than constitutional remedies. Thus, where the solution is to read-down a statute, or grant a “constitutional exemption”, Wilson J. argued these cannot indiscriminately be described as “constitutional remedies” for the purposes of s. 24(1). In her view, if a statute is characterised as over-inclusive or under-inclusive, it is not open to the Court to leave it standing in the books. S. 52(1) contemplates in her mind

“the exercise by the court of an interpretative function as a first step. Once it has interpreted the impugned legislation, it must decide on the basis of that interpretation whether the section is consistent or inconsistent with the citizen’s *Charter* right. If it is consistent, there is no problem: the legislation is constitutional and the citizen must abide by it. If it is inconsistent, then the Court must declare it of no force or effect to the extent of the inconsistency.”²⁸⁹

Wilson J. therefore does not state that legislation that needs to be “read-in” or “read-down” should more appropriately be struck down, but rather these processes are ones of interpretation and therefore cannot be considered as remedies for the unconstitutionality of legislation. In addition, Wilson J. does not state that remedies for the violation of individual rights should be more restricted, but where legislation is valid under the *Charter*, recourse to s. 24(1) should not be necessary. This provision would not be directly relevant until a remedy such as a constitutional exemption is required. Wilson J’s approach to statutory interpretation under the *Charter* is therefore reconcilable with administrative power because “reading-in” and “reading-down” are analysed as normal aspects of statutory interpretation that are necessarily part of the jurisdiction of all administrative authorities, not in the sense that they could be used in order to remedy legislation, but as part of the interpretative process that must necessarily be resorted to in

²⁸⁹ Wilson J. in *Osbourne*, *supra* note 282 at 325, L’Heureux-Dubé and LaForest JJ., concurring.

case of statutory ambiguity and therefore do not have any incidence on judicial guarantees of independence and impartiality.²⁹⁰

This interpretation of reading-in and reading-down is more convincing because it is difficult to qualify these processes as “extending the reach of legislation” or even more as “adding words” to a statute. From this perspective, the separate opinion of Lamer C.J. in *Cooper* is undeniably closer to that of McLachlin J and L’Heureux-Dubé.²⁹¹ This interpretation of “reading-in” and “reading-down” would equally clarify the “duty to apply the *Charter*” referred to by Gonthier J. in *Martin* and *Laseur*,²⁹² because there is consistent authority to the effect that, in case of ambiguity, statutory interpretations that accord with the Constitution must be adopted over those that do not.²⁹³

In *Cooper*, the Human Rights Commission stated that it did not have jurisdiction over the matter. Thus, the matter was one for the courts to decide since it was an attack on the validity of the tribunal’s statutory mandate. Hogg argues that the Human Rights Commission should have accepted jurisdiction over the matter, thereby developing a record for discussion in court, as was the case prior to 1982 for issues regarding federalism.²⁹⁴ However, this case-law is only relevant where there is a legitimate doubt as to the tribunal’s jurisdiction. Conversely, the tribunal’s statute may be unconstitutional, but if it clearly excludes jurisdiction over the matter then there is no reason why it should be compelled to develop a factual record. Where there is a doubt as to the tribunal’s jurisdiction, as defined by its statute, then it is clear that the tribunal should decide the

²⁹⁰ D. Pinard, “Les sanctions d’une règle de droit législative incompatible avec la *Charte* canadienne des droits et libertés: le reading in, le reading down, l’interprétation large, l’interprétation atténuée, etc.!” (2003) 63 R. du B. 423. It is interesting to note that the French translation of reading-in and reading-down are “broad” and “restrictive interpretation”. See also D. Pinard, “Institutional Boundaries and Judicial Review – Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence” (2004) 25 S.C.L.R. (2d) 213.

²⁹¹ D. Mullan has sought to elucidate the relation between administrative tribunals and the *Charter* by questioning the relevance of the remedy but his approach only concerns judicial powers to determine the powers of administrative tribunals rather than their powers *per se*. See Mullan, *Administrative Law*, *supra* note 10 at 362-63.

²⁹² *Martin* and *Laseur*, *supra* note 98 at 547.

²⁹³ As Cartwright J. stated: “if the words of a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result, the former is to be adopted.” *McKay*, *supra* note 301 at 803-04.

²⁹⁴ Hogg, *Constitutional Law*, *supra* note 9 at 37.3.

issue, particularly where the doubts as to its jurisdiction outweigh the arguments that it does in fact have jurisdiction over the issue. However, this was not the case in *Cooper*, nor was it in *Martin* and *Laseur*. In both of these instances, there was no room for discussion because the tribunal's statutory powers were clear.

On the other hand, this does not imply that administrative tribunals such as the *Canadian Human Rights Commission* do not have jurisdiction to address constitutional issues – they can decide issues involving individual rights, although they can only do so within their statutory mandate. Moreover, even within such a mandate, there is no doubt that administrative tribunals can investigate claims that deal with the constitutionality of legislation. As any governmental department, they may investigate the impact of legislation on individual rights and provide formulations to its amendment, and eventually provide compensation where appropriate. However, they may only do so within the limits of their statutory mandate; again, this was not the case in either *Cooper* or *Martin* and *Laseur* because in both cases, the legislation explicitly excluded a certain category of person from its operations.

Indeed, the general idea behind reading-in has been the inclusion of a non enumerated class of individuals that has not been explicitly excluded from a statutory scheme. It has also been used in cases where a statute provides for benefits for a certain specific class of persons, although it does not exclude them from others.²⁹⁵ Reading-in is therefore not the appropriate remedy in cases where a statute explicitly excludes a class of persons from a certain scheme. In such cases, the appropriate solution is to sever this provision from the Act, or, if need be, to invalidate the Act as a whole. For instance, in *Vriend v. Alberta*,²⁹⁶ the *Individual Rights Protection Act* prohibited discrimination in employment, but did not list sexual orientation as prohibited grounds of discrimination. This prompted the province's Commission to dismiss the claim. The Supreme Court ordered that such a defect be cured by reading "sexual orientation" into the statutory list of prohibited grounds of discrimination. Similarly, in *Haig v. Canada*, "sexual orientation" was read

²⁹⁵ *Schachter*, *supra* note 279.

²⁹⁶ *Vriend v. Alberta* [1998] 1 S.C.R. 493.

into the *Canadian Human Rights Act*.²⁹⁷ Again, in *Rosenberg v. Canada (Attorney General)*, the term “spouse” was read in so as to include same sex partners.²⁹⁸ In these cases, it would have been appropriate for the tribunal to “extend” the terms of its legislation, although the terms in both *Martin* and *Laseur* and *Cooper* do not favour such a solution, but rather the remedy of severance.

B. BASIS OF THE DISTINCTION: THE PRESUMPTION OF CONSTITUTIONALITY

Preference for a remedial definition of reading-in and reading down is confirmed by the absence of a presumption that legislation is enacted in accordance with the Constitution. Thus, authors who argue that there is no presumption under the *Charter* must challenge not only history but the practice of other western democracies, whether they be of common law or civil law origin. The origins of the presumption are ancient and can be found in the writings of Lord Coke: “(O)mnia praesumuntur solemniter esse acta” – all things are presumed to have been done rightly.²⁹⁹ Later, Dicey stated that when interpreting statutes, judges must presume that “Parliament did not intend to violate the ordinary rules of morality (...) and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and international morality”.³⁰⁰ In the context of Canadian federalism, it is well accepted that: “(...) if the words of a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary

²⁹⁷ *Haig v. Canada* (1992) 9 O.R. (3d) 495 (C.A.).

²⁹⁸ *Rosenberg v. Canada (Attorney General)*, (1998), 38 O.R. (3d) 577 (C.A.).

²⁹⁹ Cited in J. E. Magnet, “The Presumption of Constitutionality” (1980) 18 Osgoode Hall L.J. 87 at 96 [Magnet, “Presumption”].

³⁰⁰ A.V. Dicey cited in H. Brun & G. Tremblay, *Droit constitutionnel*, 4th ed. (Montreal: Yvon Blais, 2002) at 631.

result, the former is to be adopted.”³⁰¹ In addition, the presumption of constitutionality is confirmed in the general principle that because Parliament and legislatures are presumed to comply with the Constitution, they cannot lawfully allow for its infringement. Thus administrative action that is contrary to the Constitution is for all practical purposes *ultra vires* the enabling legislation, assuming of course that the enabling legislation is valid.

Generally, the presumption of constitutionality confirms the general principle of validity, which recognizes that all action that has force of law is deemed valid until otherwise established in a tribunal or court of law. The presumption is reflected in the reticence to recognize a doctrine of “desuetude”, according to which statutes and other laws that have lost public favor would no longer reflect community goals, and therefore automatically be repealed. It is also reflected in the inherently controversial nature of constitutional litigation, which would imply that governments in Canada generally do comply with the *Charter*. Thus, the presumption of constitutionality is polysemic because it affects statutory interpretation as well as the burden of proof.³⁰²

L. Tremblay argues in favour of a presumption against “unreasonable laws”.³⁰³ However, the dominant position goes to the contrary: Canadian jurists have understood the notion of “presumption of constitutionality” as providing statutes with immunity, and thus as being detrimental for individual rights. Thus, some have even argued: “the political aspects of the presumption of constitutionality harken back to a time before the

³⁰¹ *McKay v. Canada*, [1965] S.C.R. 798 at 803-804 [*McKay*]. See also *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 at 1193.

³⁰² Magnet, “Presumption”, *supra* note 302 at 96; compare Gibson, *General Principles*, *supra* note 8 at 56. R. Sullivan has distinguished between the presumption of constitutionality and the presumption of validity, which she argues, only applies to “jurisdictional” issues such as the division of powers and the exercise of delegated power. However, because all legislation derives its validity from the Constitution, there is no practical reason for treating the exercise of power under the *Charter* differently. See R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at 370 [Sullivan and Driedger].

³⁰³ “Section 7 of the *Charter*: Substantive Due Process?” (1984) 18 U.B.C. L. Rev. 201. See also A. Butler, S. “A Presumption of Statutory Conformity with the *Charter*” (1993) 19 Queen’s L.J. 209; D. Pinard, “Le Principe d’interprétation issu de la présomption de constitutionnalité et la Charte canadienne des droits et libertés” (1990) 35 McGill L.J. 305.

Charter when Canadian judges were mainly concerned with disputes between federal and provincial governments”.³⁰⁴

Rejection of the presumption of constitutionality is generally based on three arguments: first, the *Charter* is not relevant to all legislation, which would imply that the presumption extends the *Charter* in areas where it should not be; second, the presumption of constitutionality should be rejected because it provides a special immunity for statutes and therefore a special burden for the plaintiff; third, the presumption is misleading because it is based on the elusive notion of statutory intent. These arguments have sought to emphasise the novel character of the *Charter*, although they ultimately sustain the autonomy of statutory and constitutional interpretation.

1. Conceptual Opposition to the Presumption

Two arguments opposing the presumption of constitutionality can be examined. The first states that there should be no presumption of constitutionality because all laws are not legally relevant to the *Charter*. The second rejects the presumption of constitutionality insofar as it seeks to determine legislative intent. However, as will be seen, the presumption need not be linked to the notion of legislative intent.

a) Scope of *Charter* Rights

Because the presumption holds that legislation should insofar as possible, be held not to contradict the *Charter*, opponents of the presumption have argued that the *Charter* is not relevant to all legal activity and only legally relevant to certain laws, for instance anti-terrorism legislation, gay-marriage legislation etc...³⁰⁵ As a result, presuming legislative

³⁰⁴ W.F. Pentney, “Interpreting the *Charter*: General Principles” in G.-A. Beaudoin & E. Ratuschny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1989) at 36.

³⁰⁵ See for instance Lederman, “Competing Values”, *supra* note 134 at 134.

compliance with the *Charter* would not address the case where legislation intervenes in areas not covered by the *Charter*. This position reflects the law in relation to the division of powers where matters are said to be exhaustively enumerated, and therefore each law will fall within one or more headings listed in the Constitution. This position also reflects the traditional distinction between constitutional and statutory interpretation, which implies that the Constitution can only be interpreted when it is actually litigated by the parties, or even when a dispute actually involves rights guaranteed by the Constitution. In this respect, because the *Charter* is not an exhaustive enumeration of rights held by individuals and allows for the creation of others (s. 26), it is generally agreed there are some areas of legal activity that would not fall within its ambit, in which case there are some “*Charter-like*” areas of activity, as well as “non-*Charter*” areas of legal activity.

However, there are many reasons to doubt this position. First, it is difficult to dissociate statutory and constitutional interpretation because constitutional rights cannot be interpreted in a legal vacuum, while conversely statutes cannot be read without reference to fundamental rights enshrined in the Constitution. Second, the *Charter* is part of the Constitution and as such it does not establish a rapport of similarity with other laws but one of conformity. It does not matter whether a law is a direct or an indirect means of enhancing the rights of *Charter* rights; what matters is that it does not conflict therewith. Thus, as *Symes v. Canada (A.G.)* tells us, even fiscal technicalities are considered “relevant” to the *Charter* because they are susceptible of attack.³⁰⁶ The position that the *Charter* is not relevant to all legal activity is therefore of limited utility because no law is immune from attack under the *Charter* (except those validly enacted under s. 33), and all laws must be administered in accordance therewith; irrelevance does not preclude the requirement that all laws must necessarily be compatible with the *Charter*. Clearly, the *Charter* cannot be used to undermine valid statutory objectives, but ultimately, these either conform to the *Charter* or they do not.

³⁰⁶ *Symes*, *supra* note 708.

b) Notion of “Legislative Intent”

The presumption of constitutionality is generally classified among “presumptions of intent”,³⁰⁷ and accordingly been rejected by many authorities. Thus, it is argued that there can be no presumption of constitutionality since Parliament and the legislatures may not necessarily have had the *Charter* in mind when passing legislation, and in any case no means of proving what these institutions had in mind, especially since they are composed of hundreds of individuals, each with his or her own intent. However, such rejection is less directed at the principle that legislation should be interpreted insofar as possible before being struck down, than it is at the rationale for doing so, namely fulfilling “legislative intent”.

Opponents of the presumption argue that Parliament and the legislatures may not have had the *Charter* in mind when drafting legislation, either that which was drafted before 1982, or even afterwards. Parliament and the legislatures, it is said, could not have the *Charter* in mind before 1982 since it did not even exist. Moreover, they may not necessarily have it in mind today, or may even have it in mind but prefer to defer the issue of its constitutionality to the judiciary. Some judges have even argued that because the *Charter* does explicitly provide that statutes should be interpreted insofar as possible before being declared unconstitutional, than their constitutionality should not be presumed.³⁰⁸ In doing so, they contrast the *Charter* with the *Canadian Bill of Rights* which provides in s. 2 that all legislation is to be construed in compliance therewith.³⁰⁹ Thus, s. 3 of the *Bill of Rights* imposes an obligation of on the Minister of Justice to scrutinise any a bill or regulation as well report to the House of Commons on the

³⁰⁷ Sullivan & Dreiger, *supra* note 302 at 361.

³⁰⁸ *R. v. Vella* (1984), 14 C.C.C. (3d) 513 at 537 (Ont. H. Ct.).

³⁰⁹ S. 2 of the *Bill of Rights*, *supra* note 24 states: “every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied ...”

compatibility of any bill with the *Bill of Rights*.³¹⁰ In contrast, the *Charter* contains no such obligation of pre-enactment scrutiny.³¹¹

However, prior to the enactment of the *Charter*, many audits were carried out so as to verify the constitutionality of legislation, and thereby minimize its impact upon enactment.³¹² Moreover, the great majority of unconstitutional statutes were enacted after the *Charter*.³¹³ In addition, in 1985, the *Department of Justice Act* was amended so as to equally require similar scrutiny and report for *Charter* compliance of bills and regulations.³¹⁴ This is also the case in some provinces.³¹⁵ Federal regulations are equally screened pursuant to s. 3 of the *Statutory Instruments Act*.³¹⁶ The former *Act* requires the Attorney General of Canada to report to the House of Commons if any Bill is inconsistent with the *Charter*. There is not a novelty because government bills have always been drafted by Legislative Counsel, who report to the Attorney General.

While Cabinet, and even less Parliament, are not bound by the advice of the Attorney General, this cannot necessarily be taken as proof of potential governmental or Parliamentary intention to act unconstitutionally (i.e. impose unreasonable limitations on individual rights), but rather a reminder that several interpretations will necessarily arise out of the same text. Thus, consideration of potential unconstitutionality is systematically taken into account.³¹⁷ Thus, Parliament cannot, and will not pass an Act without the full ascertainment of its compliance with the Constitution. Of course it does not have the final word on this but it is clear that if the judiciary has any doubt, it should interpret it so as to avoid the unconstitutionality. Thus Hart and Sacks ask: “Is legislative

³¹⁰ S. 3 of the *Bill of Rights*, *ibid.*, requires that the Attorney General of Canada to “ascertain whether any of the provisions (of proposed statutes and regulations) are inconsistent with [the *Bill of Rights*].”

³¹¹ S. 15 A of Australia’s *Acts Interpretation Act (1901)* states: “Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth ...”

³¹² Butler, *supra* note 334 at 243.

³¹³ Morton, Russel & Witney, *supra* note 3 at 27-28 (Table 8).

³¹⁴ Thereby repealing and replacing s. 3 of the *Bill of Rights*, *supra* note 24. See S.C., 1985, c. 26. S. 106 added s. 4.1 to the *Department of Justice Act*, R.S.C. 1985, c. S-11.

³¹⁵ P.J. Monahan & N. Finkelstein, “The *Charter* of Rights and Public Policy in Canada” (1992) 30 Osgoode Hall L.J. 501. This article discusses the approaches taken at the federal level, as well as those taken in Ontario, Saskatchewan and British Columbia.

³¹⁶ R.S.C. 1985, c. S-22.

³¹⁷ This is equally the case in other commonwealth countries. See Butler, *supra* note 334 for foreign examples.

procedure a mere routine? Or does it have a function in the shaping of legislative intention which cannot be properly be ignored? If it does, then the particular collocation of words which was the product of that procedure cannot be ignored either.”³¹⁸

These arguments nevertheless confront the problem that not every jurisdiction in Canada has such pre-enactment scrutiny legislation. Moreover, the notion of legislative intent has received much criticism. For instance, Gibson argues that the premise of rooting “reading down” as a consequence of a presumed intent is unconvincing.³¹⁹ This position has been confirmed and reinforced by others: “The general principle that the legislature intends to act constitutionally is a judicially created fiction to bolster an image of judicial deference to the legislature.”³²⁰ Generally, the argument is that presumed intention may be a false lead because the legislature may have doubted the constitutionality of its legislation and would prefer in certain cases, to shift the burden onto the judiciary. The attitude is perhaps best illustrated by C. Curtiss: “It is a hallucination: the search for intent. The room is always dark.”³²¹ In this line of argument, “At best it is a sort of decorative literature that we leave lying about in the anterooms of statutory interpretation. At worst, it is an elaborate exercise in self-deception that leads interpreters, including lawyers, administrators and judges to deny and/or ignore their inevitable public policy roles.”³²² For Sopinka, presuming intent is a “disguise” which forces “engagement in a fictitious analysis that attributes to the legislature an intention that it did not have.”³²³

However, these criticisms do not weaken the presumption of constitutionality as such, but only question the utility of classifying it as a “presumption of intent”. These are different problems because some authors have accepted the notion of presumption of constitutionality while nevertheless rejected the notion of intent.³²⁴ On the whole, the

³¹⁸ H.M. Hart Jr. & A.M. Sacks in W.N. Eskridge Jr., & P.P. Frickey, eds., *The Legal Process – Basic Problems in the Making and Application of Law* (New York: Foundation Press, 1994) at 1196.

³¹⁹ Gibson, *General Principles*, *supra* note 8 at 57-58.

³²⁰ Rogerson, *supra* note 156 at 248.

³²¹ D. Robertson, *Judicial Discretion in the House of Lords* (Oxford: Clarendon Press, 1998) at 72.

³²² H.W. MacLauchlan, “Approaches to Interpretation in Administrative Law” (1998) 1 Can. J. Admin. L. & Prac. 292 at 304.

³²³ Osbourne, *supra* note 282 at 105.

³²⁴ P.W. Hogg, “Legislative History in Constitutional Cases” in Sharpe, *Charter Litigation*, *supra* note 3, 131 at 133.

notion of intent is objectionable because it is not legislation that possesses it but its drafters taken individually. As such, legislation does not have a single intent but many. Thus, Willis concluded that statutory intent is a “harmless, if bombastic way of referring to the social policy behind the Act.”³²⁵ Accordingly, “legislative intent” more appropriately collapses into the notion of “purposive interpretation”.

2. Incompatibility of the Presumption with the Shifting Burden of Proof under the *Charter*

The next argument against the presumption of constitutionality is that it provides a special immunity to statutes, and therefore an additional burden on plaintiffs. Thus, although the presumption had a role to play in the constitutionality of statutes in the context of Canadian federalism, it is seen as anachronistic under the *Charter*. As will be seen, this argument had been presented somewhat contradictorily during the drafting of the *Charter*, and remains an important argument for those opposing the presumption of constitutionality.

a) Statement of the Problem

Some have noted that while American constitutional law began by adopting a presumption of constitutionality, it is no longer important for the determination of whether the law is constitutional. “In this sense, then, deference to legislative judgment plays a role in modern American constitutional law, but only to the extent of the particular constitutional issue under consideration.”³²⁶ In this respect, the drafters of the *Charter* wanted to ensure that plaintiffs, unlike those in the United States, do not bear the

³²⁵ J. Willis, “Statutory Interpretation in a Nutshell” (1938) 16 Can. Bar Rev. 1 at 3.

³²⁶ G.R. Stone, “Limitations on Fundamental Freedoms: the Respective Roles of Courts and Legislatures in American Constitutional Law” in A. de Mestral *et al.*, *The Limitation of Human Rights in Comparative Constitutional Law* (Montreal: Yvon Blais, 1986) 173 at 180.

entire burden of proof of demonstrating that a law is unconstitutional. Accordingly, s. 1 of the *Charter* – the limitation clause – was added so as to allow the burden of proof to shift upon to the government when the plaintiff's claim was sufficiently established. Before the Joint Special Committee of the Senate and of the House of Commons on the Constitution of Canada, Dr. B.L. Strayer stated: "it was the belief of the drafters that by going to these words demonstrably justified or can be demonstrably justified, it was making it clear that the onus would be on the government, or whoever is trying to justify the action that limited the rights set out in the *Charter*, the onus would be on them to show that the limit which was being imposed not only was reasonable, which was in the first draft, but also that it was justifiable or justified, and in doing that they would have to show that in relation to the situation being dealt with, the limit was justifiable."³²⁷ Thus, the words "demonstrably justified" imply that the onus is on the government to demonstrate that the limitation of rights is reasonable, not on the plaintiff. Accordingly, because of the shifting burden from plaintiff to government, it is said that there is no "presumption of constitutionality".³²⁸

However, this position conflicts with other testimony provided to the Joint Special Committee. Professor Tarnopolsky stated that the application of the *Charter* to administrative action was firmly established by the fact that Parliament and the legislatures would not be entitled to violate the Constitution nor authorize its violation, and accordingly, should be presumed as having complied with it. In his words: "it would seem to me that just under the ordinary rules of statutory interpretation on administrative law, a regulation cannot provide for powers which cannot be traced to the original enacting statute. And in exactly the same way as the original enacting statute can be challenged, I see no reason why the original regulation should not be challengeable."³²⁹ Professor Tarnopolsky continued: "I cannot see how, on the basis of administrative law

³²⁷ See the testimony of B.L. Strayer, Assistant Deputy Minister Public Law of the Federal Department of Justice in Canada, *Minutes of Proceedings and Evidence of the Joint Special Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 38 (15 January 1981) at 38:45 (Joint Chairs: H. Hays & S. Joyal).

³²⁸ P.W. Hogg, "Section One of the Canadian *Charter* of Rights and Freedoms" in A. de Mestral *et al.*, *supra*, note 326, 3.

³²⁹ *Minutes of Proceedings and Evidence of the Joint Special Committee of the Senate and of the House of Commons on the Constitution of Canada*, 3rd Session of the 30th Parliament (Sept. 12, 1978) at 12:28.

principles well established apart from bills of rights, one could possibly exercise a power under regulation without it being challengeable in the same way as the enacting statute, and even on the basis which certainly has been followed in American decisions, that when Parliament enacts a statute it intends the powers to be exercised in accordance with the Constitution. Therefore, clearly a regulation which goes against the Constitution, i.e. the Bill of Rights, would be invalid to that extent or inoperative.”³³⁰

Nevertheless, contrary to Professor Tarnapolsky’s position, the presumption of constitutionality has generally been rejected under the *Charter*. Thus, in *Manitoba (A.G.) v. Metropolitan Stores Ltd*, the Supreme Court rejected the presumption of constitutionality, which the Manitoba Government used as an argument to protect legislation against a preliminary order affecting its enforceability. Beetz J., speaking for a unanimous Supreme Court, ruled that there was no “so-called presumption of constitutional validity” with regard to the *Charter*.³³¹ He continued: “Not only do I find such a presumption not helpful, but, with respect, I find it positively misleading.”³³² In his view, “the innovative and evolutive character of the *Canadian Charter of Rights and Freedoms* conflicts with the idea that a legislative provision can be presumed to be consistent with the *Charter*.”³³³ This conclusion raises many questions, particularly since it conflicts with the practice of other constitutional democracies with entrenched bills of rights.³³⁴ Thus, while it is accepted that the framers of the *Charter* sought to ensure a fair interplay between the burden of proof of individuals and that of the government, it is difficult to accept this objective as implying a wholesale rejection of the principle that statutes are deemed valid unless otherwise demonstrated.

³³⁰ *Ibid.*

³³¹ [1987] 1 S.C.R. 110 [*Metropolitan Stores*].

³³² *Ibid.* at 122.

³³³ *Ibid.*

³³⁴ A.S. Butler, “A Presumption of Statutory Conformity with the *Charter*” (1993) 19 Queen’s L.J. 209 at 210.

b) Academic Accommodation of Presumption under the *Charter*

Scholarship has struggled to reconcile the shared burden of proof in *Charter* litigation with the presumption that all statutes are valid. In an older edition of his textbook, Hogg argued in favour of a presumption of constitutionality based on the adversarial nature of the judicial process in Canada, as well as the lack of democratic accountability of the judiciary.³³⁵ Gibson countered, arguing that such a posture of restraint was like presuming guilt for an accused.³³⁶ Later, Hogg modified his position by stating: “(t)he general rule that a statute should be interpreted as far as possible to conform to the Constitution would apply to the *Charter* as well as to the federalism part of the Constitution.”³³⁷ However, he argues that the presumption of constitutionality is weaker in *Charter* cases, and that it only applies where the statute needs to be “read down”, as opposed to “read-in”. Thus, in cases where a statute would need to be “read-in”, its constitutionality would not be presumed.³³⁸ Because individuals must initially demonstrate a *prima facie* violation of their rights, Hogg states that this is simply a rule of procedure requiring that “the one who asserts must prove” and does not entail any such “presumption of constitutionality”. Having successfully proved a *prima facie* violation, Hogg states that there is no presumption that the law is a reasonable limit that can be demonstrably justified in a free and democratic society. “On the contrary, he continues, the burden is on the government to prove that the elements of s. 1 justification are present.”³³⁹

Hogg explains the absence of a presumption of constitutionality under the *Charter* for the remedy of reading-in by the difference in power between the government and private

³³⁵ *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 99-100.

³³⁶ Gibson, *General Principles*, *supra* note 8 at 59.

³³⁷ Hogg, *Constitutional Law*, *supra* note 9 at 35.5.

³³⁸ The distinction between reading-in and reading-down is not always clear. As some have noted: “a narrow construction is accomplished by reading in a limitation on the operation of the law”. See Rogerson, *supra* note 156 at 235.

³³⁹ *Ibid.*

individuals.³⁴⁰ Thus, in federalism cases, “a presumption tilts in favour of upholding the law that has been enacted by one of the levels of government.”³⁴¹ Because *Charter* cases involve government and individuals, asserting violations of their rights, “it is not appropriate to tilt the scale in favour of the government”.³⁴² Moreover, it has been argued that the *Charter* is different from federalism review because it requires remedial flexibility in order to protect individual rights rather than the collective rights of provinces as a whole.³⁴³ Last, federalism review seeks to determine which majority has jurisdiction: national or provincial. In *Charter* review, the logic is counter-majoritarian since it is asked whether any of the two majorities has the right to take a particular measure.³⁴⁴ Thus, there would be no claim to jurisdiction, and therefore no presumption of constitutionality.

However, the reasons why a distinction must be made between reading-in under the *Charter*, and all other constitutional principles such as federalism are difficult to accept. At the outset, the *Charter* defines the jurisdiction of both Parliament and the legislatures by stating what types of limitations they may put on individual rights (s. 1) and under what circumstances legislation may be shielded from review (s. 33).³⁴⁵ This minimises the difference between federalism review, and review under the *Charter*. In addition, it remains that individuals bear the initial burden of proof for providing a *prima facie* demonstration that their rights have been infringed. Indeed, it would be difficult to simply allow individuals to submit proof of a limitation of their rights, since no right, by definition, is absolute and therefore all carry co-substantive limitations. If government must prove that an infringement is reasonable and justified in a free and democratic society, the applicant must initially provide *prima facie* evidence of a violation of a fundamental right.

³⁴⁰ *Ibid.* See also P.J. Monahan & A. Petter, “Developments in Constitutional Law: The 1985-86 Term” (1987) 9 Sup. Ct. L. R. 69 at 84; Rogerson, *supra* note 156.

³⁴¹ Hogg, *Constitutional Law*, *ibid.*

³⁴² *Ibid.*

³⁴³ Although nothing in theory would prevent a province from arguing that legislation violates the *Charter*, particularly when it may do so more easily than argue that it impedes upon provincial jurisdiction.

³⁴⁴ Rogerson, *supra* note 156.

³⁴⁵ Hogg also states that both laws that violate the *Charter* and federalism principles should be held “*ultra vires*”. See Hogg, *Constitutional Law*, *supra* note 9 at 5.5(b).

In fact, presuming constitutionality for cases where legislation needs to be “read-in” is controversial not because of the imbalance of power between individuals and government but because “reading-in” is seen as more than a “broad” or “generous” interpretation of a statute. In contrast, statutes have been presumed constitutional in cases of “reading-down” because this “Charter remedy” has been synonymous with restrictive statutory interpretation.³⁴⁶ Thus, it is not necessary to argue that a statute is unconstitutional in cases where it needs to be “read-down”. In contrast, statutes simply cannot be “read-in” as a matter of broad and generous interpretation: their constitutionality must be brought into question, and they must accordingly be “remedied”. Nevertheless, it would clearly be in a plaintiff’s interest to obtain the remedy of reading-in by the mere process of statutory interpretation than by having to argue that a particular law is unconstitutional. Thus, because judges can only apply the law within the confines of ordinary statutory meanings (here: as they existed before 1982), parties must raise a constitutional argument in order to obtain the broader redress of “reading-in”. In this respect, rejecting the presumption because of the imbalance of power, on the pretext of favouring the plaintiff is misleading because if a statute were presumed constitutional, even for cases requiring “reading-in”, its constitutionality would not have to be brought into question: reading-in and reading-down would stand on the same footing. This would make the task of the plaintiff easier since a constitutional argument would not be required.³⁴⁷

In this respect, academics have resisted seeing reading-in as broad interpretation, even at the expense of arguing that reading-in allows judges to “add words” to a statute, as an exception to the “rule against reconstruction”, which nevertheless still applies under the *Charter*.³⁴⁸ Thus, the issue is not whether judges should give statutes a meaning they do not have, but rather why should there be a difference between a generous interpretation of statutory language that does not contradict its “ordinary meaning”, and the *Charter* remedy of “reading-in”? In light of this discrepancy, it is possible to see why there should only be a presumption for “reading-down”. Thus, while the rejection of the presumption

³⁴⁶ Hogg, *Constitutional Law*, *supra* note 9 at 37.1(g).

³⁴⁷ For an example see *Mossop*, *infra* note 783.

³⁴⁸ *Ibid.* at 37.1(i).

for cases of “reading-in” appears to favour individual rights, in practice, it purports to impose on them the burden of raising a constitutional issue, thereby warranting a broader interpretation not otherwise available under ordinary rules of statutory interpretation.

Conclusion

The proper integration of the *Charter* in the administrative process implies recognising a general interpretative presumption of constitutionality - presuming that administrative authorities only have the power to impose reasonable limits on individual rights. *Martin* and *Laseur* state that administrative tribunals with powers to decide questions of law are presumed to have the power to rule on the constitutional validity of their enabling statutes, although this should be distinguished from the general interpretative presumption of constitutionality. Indeed, most authorities emphasized that such a mechanism has become outdated since 1982. However, while it is generally noted that American administrative tribunals do not have as large powers as do now their Canadian counterparts, this opinion ignores the greater role of the presumption in the United States.³⁴⁹

These factors point to the conclusion that there must be conceptual clarity between the definition of administrative powers on the one hand, and determining whether or not primary legislation is unconstitutional on the other, a distinction that *Martin* and *Laseur* do not make. The problem cannot be resolved by asking whether an authority can apply the *Charter*. The *Charter* is a constitutional document but it is also part of the Constitution, and needless to say, part of the law. Defining its proper operation involves

³⁴⁹ *Supra*, note 104 at 1706.

³⁵³ *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), leave to appeal to the S.C.C. denied, (1986), 58 O.R. (2d) 274 [*Re Blainey*]; *Vriend*, *supra* note 296.

studying it, litigating it and teaching it not as an autonomous document with its own internal mechanics, but within the greater framework of public law. To this extent, the solutions provided in *Martin* and *Laseur* will be just another block in definition of administrative powers under the Constitution.

Conclusion to Part I

It is difficult to reconcile the notion that administrative tribunals should apply the *Charter* with the notion that the *Charter* applies to government and ultimately to certain institutions and types of laws. On the one hand, the evolution in the case-law of the Supreme Court demonstrates a desire to protect the judiciary from unnecessary litigation by limiting the scope of the *Charter*, although such limits cannot be reconciled with the increased powers of administrative tribunals under the Constitution.

Indeed, individuals must exhaust administrative recourses before applying for judicial review. Ultimately, whether action is public or private is legally irrelevant since individuals can always argue that provincial human rights legislation is unconstitutional.³⁵³ Thus, distinguishing between government and non-governmental action will be of decreasing utility since every jurisdiction in Canada, including Nunavut since November 2003, provides legislation protecting individuals from discrimination, not only from government but from other individuals.³⁵⁴ Moreover, governmental authorities have a duty to interpret their powers in accordance with the Constitution since primary legislation cannot lawfully authorise the violation of the *Charter*. Thus, administrative tribunals have a duty to interpret the law in accordance with the *Charter*, which ultimately implies “reading-in” and “reading-down” so as not to violate individual rights, and this, even when no constitutional argument has been made. Indeed, the question that now arises is not whether the *Charter* applies to individuals and

³⁵⁴ *Human Rights Act*, S. Nu. 2003, c. 12.

government, but rather when individuals should be required to exhaust available remedies and when judicial intervention should be justified.

While it may be argued that the notion of “applying the *Charter*” will be diluted if every individual is seen as “applying the *Charter*”, as opposed to only government, this may reflect a problem with the expression itself. The problem is not determining whether an authority can apply the *Charter*, but rather when individuals must exhaust available remedies, when exceptions to the exhaustion rule can be made, and ultimately whether the facts of each case demand redress. Thus, all “law-making” authorities have a part to play in the application of the *Charter*, whether they function judicially or not. Thus, it is difficult to conclude that it has permanently altered the distinction between public and private law in Canada. Reflecting the powers of administrative tribunals under the *Charter*, the effects of the *Charter* flow from all legal grants of power and produce legal effects. The question that now arises is how the *Charter* has affected judicial power to review the exercise of such power.

PART II –IMPACT ON JUDICIAL POWER

Although much has been said regarding the effects of the *Charter of Rights and Freedoms* on the exercise of judicial review, little attention has been paid to the relation between judicial review and the *Charter*. We know that the *Charter* is not applicable to private law relations.³⁵⁵ One would therefore conclude that if judicial review is by definition a mechanism for obtaining redress for the actions of public law bodies, the exercise of judicial review would necessarily entail the applicability of the *Charter*. This is corroborated by the fact that judicial review can only be exercised against authorities wielding “statutory powers” or those related such as Crown prerogative.³⁵⁶ Judicial review and the *Charter* would therefore dominate the same sphere of action: the former as a mechanism of redress, the latter as an ultimate standard of assessment.

The importance of these implications cannot be overstated, especially if we consider that the *Charter* has not changed Canada as a country based on the rule of law.³⁵⁷ This axiom implies that public authorities cannot exceed their powers without being sanctionable by judicial review. However, in spite of the strong link between judicial review and the Constitution, Canadian law does not recognize the correlation between judicial review and the *Charter*. Indeed, jurists have assumed a classification of judicial review into a four-part matrix: one axis dividing legislation and government action; the other, the Constitution and the common law. Thus, by distinguishing historical and legal foundations of judicial review, common law and *Charter* review of administrative action have developed as autonomous causes of action against government.

³⁵⁵ *Dolphin Delivery*, *supra* note 6.

³⁵⁶ *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1., codifying the common law of judicial review in the province of Ontario.

³⁵⁷ Preamble of the *Charter*, *supra* note 1.

The theory of the *Charter* “cause of action” raises the question as to what role the *Charter* plays in the judicial review of administrative action and when individuals must raise constitutional issues, procedurally more costly, in order to obtain redress. These approaches to review, and their autonomy from one another, can be likened to a debate between Ronald Dworkin and Richard Posner, who distinguished between legal reasoning from the “top down” and from the “bottom up”. The former, Posner stated, was the most common form of legal reasoning for constitutional lawyers, where a legal theory is adopted and used to justify a solution.³⁵⁸ Conversely, in “bottom up” reasoning, the individual starts with case-law or the legislation and moves upward according to the necessity to resolve the case at hand. However, Posner noted, “(t)he top downer and the bottom upper do not meet”.³⁵⁹

This debate sums up well the state of the law regarding the impact of the *Charter* on the judicial review of administrative action: on the one hand, the *Charter* is part of the Constitution and therefore must be complied with in the exercise of the judicial review. However, because it is treated as an autonomous cause of action, it is not necessarily complied with unless the constitutionality of the discretionary power is explicitly raised in court, even when the legal issue does not concern the validity of a statute. Thus, constitutional legality can only be ensured when a dispute is litigated from the top-down, rather than from the bottom up (i.e. common law). In this respect, both the source of judicial power to review administrative action, and the inconsistencies related to the definition of the *Charter* as an autonomous cause of action against government confirm that it is difficult to interpret the *Charter* statutory remedy against government.

³⁵⁸ R.A. Posner, *Overcoming Law* (Cambridge, Mass.: Harvard University Press, 1995) at 173.

³⁵⁹ *Ibid.*

CHAPTER 5 –SOURCE OF JUDICIAL POWER TO REVIEW ADMINISTRATIVE ACTION

The relationship between the Constitution and the judicial review of administrative action has traditionally been approached by asking whether there is a “constitutionally guaranteed right” to review.³⁶⁰ However, judicial review is not a remedy but the means of obtaining one. Moreover, phrasing the problem in such a manner has polarised debate because recognising the constitutional foundations of the judicial review of administrative action should also imply consideration of its constitutional limitations. Thus, while it is agreed that the judicial review administrative action should not solely be concerned with constitutional considerations, understanding its legal sources is essential to the definition of both its legal basis and limits.

The term “source” can refer to both substantive and formal sources of judicial power to review administrative action. As substantive sources of judicial power to review administrative action, one might find natural justice, *Charter* rights, other human rights legislation, and the separation of powers. As formal sources, one might include *inter alia*, the Constitution on the one hand, statute and the common law on the other, each holding different legal force. However, the inquiry into the source of judicial power to review administrative action is only useful if it concerns form: substantive sources can often complement each other, while formal sources indicate precedence in case of conflict.

This distinction is not always understood. Indeed, there has been much debate on the source of judicial power to review administrative action in the UK. Authors have been divided between those arguing in favour of *ultra vires* as a “constitutional” foundation of judicial review, and those who argue that it is the common law that constitutes the foundation of judicial power. Nevertheless, the contours of this debate have not been

³⁶⁰ Jaffe, *supra* note 116 at 376.

clear. The *ultra vires* camp argues that the judicial review of administrative action is based in the separation of powers, thereby ensuring that administrators do not overstep their statutory and prerogative powers.³⁶¹ This camp emphasises that in condemning government action without any explicit legal warrant, judges are in one way or another fulfilling the will of Parliament. Opponents of *ultra vires* argue that it is the common law, not the separation of powers, which provides the basis for judicial review.³⁶² Such writers have attempted to articulate a theory according to which the courts are viewed as enforcing autonomous principles of good administration which bear no relation to Parliamentary intent.

However, it is difficult to oppose common law and the English constitution as alternate foundations. As Hearn, stated in opening his treatise: “The English constitution forms a part of the Common Law”.³⁶³ Thus, the debate between the two camps concerns more the utility of the notion of intent as it does sources of power. Moreover, because the English constitution is not entrenched, both schools have the common position of advocating different substantive sources of judicial power to review administrative action, as opposed to formal sources. Thus, even by opposing the Constitution and the common law as alternative foundations of judicial power to review administrative action, British authors have in fact opposed substantive sources while trying to frame the debate as one of form. It is therefore correct but not surprising to conclude that the judicial review of administrative action rests upon a “set of constitutional foundations”.³⁶⁴ Whether these are described as “constitutional”, however, does not easily distinguish them from one another. Thus, even though it is a constitutional notion, the separation of powers does not take legal precedence over the common law but rather is part of it because the English

³⁶¹ Wade & Forsyth, *supra* note 14 at 35.

³⁶² See D. Oliver, “Is the Ultra Vires Rule the Basis of Judicial Review?” (1987) P.L. 543; P.P. Craig, “Ultra Vires and the Foundations of Judicial Review” (1998) Cambridge L.J. 63; Lord Woolf, “Droit Public - English Style” (1995) P.L. 57; Sir J. Laws, “Law and Democracy” (1995) P.L. 72 and “Illegality: The Problem of Jurisdiction” in M. Supperstone and J. Goudie (eds.), *Judicial Review*, 2nd ed. (London: LexisNexis, 1997); Sir S. Sedley, “The Common Law and the Constitution” in Lord Nolan and Sir S. Sedley, *The Making and Remaking of the British Constitution* (London: Blackstone Press, 1997). See generally: F. Forsyth, ed. *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000).

³⁶³ W.E. Hearn, *The Government of England, its structure, and its development* (London: Longmans, Green, Reader, and Dyer, 1867) 1.

³⁶⁴ Elliot, *Constitutional Foundations*, at 252.

Constitution is not entrenched. In this respect, some have concluded that opposing the common law and the separation of powers, as different foundations of judicial review is a “conceptual conundrum”.³⁶⁵

Nevertheless, in countries with entrenched constitutions such as Canada, Australia and the United States, the distinction between common law or statutory sources on the one hand, and constitutional sources of judicial power to review administrative action, on the other, takes on a different meaning because it opposes not substantive sources, but formal sources of law, of different legal force. Determining the formal source of judicial power to review administrative action in such countries is all the more relevant because it has generally been agreed that judicial review finds its source in the Constitution, although the judicial review of administrative action is based on the common law.

However, even in countries with entrenched constitutions, some have argued that the common law is the ultimate constitutional foundation of judicial power. Sir Owen Dixon stated that the common law should be treated as anterior to constitutions, and therefore as the “ultimate foundation” of judicial power.³⁶⁶ This foundational status of the common law appears to be a direct consequence of its generality. For example, Dixon argued that in the colonies, the common law is the “general law”. However, Dixon argued that British colonies inherited a system of common law from England, although they did not inherit the doctrine of parliamentary sovereignty which was not an inherent attribute of colonial legislature, but one that properly belonged to the Parliament at Westminster. As a result, organs of government in the colonies are established “by law”, rather than “by the people” as in the United States. Correlatively, legislative acts from colonies contrary to the Constitution are reviewable in the courts. The supremacy of the common law in the colonies reigned just as Coke’s vision in *Dr. Bonham’s Case*, where an Act of Parliament contrary to common right and reason would be void. In taking his argument further,

³⁶⁵ T.R.S. Allan, “The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry” 61 [2002] Cambridge L.J. 87.

³⁶⁶ The Right Honourable Sir Owen Dixon, “The Common Law as an Ultimate Constitutional Foundation” (1957) 21 Austl. L.J. 240 at 241. Compare M. D. Walters, “The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law” (2001) 51 Univ. of Toronto L.J. 91.

Dixon argued that the common law forms the general law of the new colonies, to the exclusion of their written constitutions. In his words:

“It is easy to treat the written instrument as the paramount consideration, unmindful of the part played by the general law, notwithstanding that it is the source of the legal conceptions that govern us in determining the effect of the written instrument.”³⁶⁷

This view was sustainable when the colonies were initially established, although it is difficult to accept Dixon’s distinction between written law, on the one hand, and the general law as unwritten law, on the other. Indeed, Dixon emphasised the traditional British view of statutes as incursions upon the general law, a view well adapted for countries functioning on the basis of an unwritten constitution. However, there is no reason for excluding written law from the “general law”, especially if it is entrenched in the Constitution. Thus the inquiry into the source of judicial power does not oppose substantive sources (common law or the Constitution), nor does it oppose written or unwritten sources of power, but formal sources of power, taking into account that the Canadian constitution comprises both written and unwritten sources.

Thus, to what extent has the judicial review of administrative action evolved in conceptual isolation from the Constitution, particularly with the enactment of the *Charter*? More specifically, because the judicial review of administrative action is divided between the Federal Courts and provincial superior courts, the question arises as to what extent the judicial review of administrative action in provincial superior courts is based on the Constitution, and whether this should differ for the Federal Courts.³⁶⁸

³⁶⁷ Dixon, “Ultimate Constitutional Foundation”, at 245. Nevertheless, Dixon appeared to argue that written and unwritten law formed part of an integrated whole: “constitutional questions should be considered and resolved in the context of the whole law, of which the common law, including in that expression the doctrines of equity, forms not the least essential part.” See also The Right Honourable Sir Owen Dixon, “The Law and the Constitution” (1935) 51 Law Q. Rev. 590-614.

³⁶⁸ *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 1.

A. SOURCE OF SUPERIOR COURT POWER

Canadian judges have long said that they draw their powers from the Constitution – in other words that they have “inherent” powers, that their powers are implied in the judiciary provisions of the *Constitution Act*,³⁶⁹ or that they originate in the unwritten constitution,³⁷⁰ or that they were bequeathed to Canadian courts by those of United Kingdom,³⁷¹ or that they are intrinsic to the very process of adjudication,³⁷² or that they have “ancient origins”.³⁷³ Indeed, it is clear that judicial review of legislation is a constitutionally guaranteed power and as such, it cannot be precluded by statutory formalities, however small. As stated by Laskin J. in *Thorson v. Canada (A.G.)*:

“Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied ...”³⁷⁴

However, there have been no explicit pronouncements to the effect that the judicial review of administrative action is guaranteed by the *Charter*. There have even been pronouncements to the contrary. In the *Secession Reference*, the Supreme Court stated:

“A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.”³⁷⁵

However, the distinction between “constitutional judicial review” and “non-constitutional judicial review” is questionable because the power to review administrative action was recognised before the introduction of the *Charter* as being constitutionally grounded in

³⁶⁹ *Constitution Act, 1867*, ss. 96-101, *supra* note 86. See *Residential Tenancies Act*, *supra* note 58.

³⁷⁰ *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 752 [*Manitoba Language Reference*].

³⁷¹ *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at para 29, per Dickson C.J.C.

³⁷² *Re Oil, Chemical & Atomic Workers Polymer Corporation Ltd.* (1959), 10 L.A.C. 51 (Ont. Arb. Bd.) Arbitrator Laskin, *aff'd* (sub nom. *Imbleau v. Laskin*) [1962] S.C.R. 338.

³⁷³ *MacMillan Bloedel*, *supra* note at 75 at 754-55. These examples are cited from H. Arthurs, “Constitutional Courage” 49 (2004) McGill L. J.1 [Arthurs, “Constitutional Courage”].

³⁷⁴ [1975] 1 S.C.R. 138 at 151 [*Thorson*].

³⁷⁵ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 249 [*Secession Reference*].

federal power to appoint provincial superior court judges under s. 96 of the *Constitution Act, 1867*. Moreover, the distinction between “constitutional judicial review” and “common law judicial review” is difficult to sustain because it has long been recognised that the “common law judicial review of administrative action” is legally based on the Constitution. This is both the case in Canada as it is in the United States.

1. Source of Superior Court Power to Review Administrative Action in the United States

In spite of the correlation between judicial review and the Constitution sanctified in *Marbury v. Madison*,³⁷⁶ the foundations of the judicial review of administrative action are not as strong.³⁷⁷ This is the result of the idea that the judiciary should limit its interventions to protect individuals from government, rather than protect rights under the Constitution. This is the approach taken by the United States Supreme Court, which began with the proposition that administrative law is founded on the Constitution, although has incrementally been eroded, thereby establishing a disjuncture between judicial review and the Constitution.

a) Primacy of the Constitution over Administrative Action

In the United States, judicial review is anchored in the state and the federal constitutions, and ultimately in the latter. This position received clear recognition by Mr. Justice Brandeis, who stated:

³⁷⁶ *Marbury vs. Madison*, 1 Cranch 137 (U.S. 1803) [*Marbury*].

³⁷⁷ H.P. Monaghan, “*Marbury* and the Administrative State” (1983) 83 Colum. L. Rev. 1; B. Schwarz, *Administrative Law*, 3rd ed. (Boston: Little, Brown, and Company, 1991) at 482-83. For an Australian perspective on the issue, see S. Gageler, “The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?” (2000) 28 Federal Law Review 301.

The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgement of a court on the ultimate question of constitutionality.³⁷⁸

This position finds its source in the constitutional grant of judicial power, as well as in the due process clause.³⁷⁹ To this extent, judicial review can be seen as a constitutionally protected right. When a court is faced with an application for judicial review, it must apply “all the relevant law”.³⁸⁰ The relevant law does not stop with the administrative order being reviewed, which in itself is not a valid source of enforceable law. The relevant law also includes the regulations and statute under which the order was taken and ultimately the Constitution under which the legislature took its authority. As Mr. Justice Rutledge stated:

“(W)henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right and due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process (...).”³⁸¹

This statement is therefore derived from Mr. Justice Marshall’s recognition that judicial power to apply the Constitution under all cases coming under it.³⁸² However, this position has not withstood the test of time.

³⁷⁸ *St. Joseph Stock Yards v. United States*, 298 U.S. 38, 84 (1936) (concurring opinion). See also the statement by Mr. Justice Jackson in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 646 (1952) (concurring opinion). See more generally Jaffe, *supra* note 116 at 376.

³⁷⁹ *Ibid.* at 384.

³⁸⁰ Expression used by Jaffe, *ibid.*

³⁸¹ *Yakus*, *supra* note 115 at 468 (dissenting opinion).

³⁸² *Marbury*, *supra* note 376.

b) Erosion of the Constitutional Foundations of Judicial Review

On the one hand, the *Administrative Procedures Act* placed parameters on judicial review by requiring only that “final agency actions”, as opposed to “planned agency actions” or “agency programs” are subject to review.³⁸³ These are therefore not formal exclusions of review but mere procedural requirements ensuring the quality of judicial review. However, the *Act* also states that judicial review of administrative action is precluded where a statute precludes it,³⁸⁴ and also when a statute is “committed to agency discretion by law”.³⁸⁵

Giving effect to such provisions would imply that Congress can withdraw judicial powers, with the possibility that the judiciary can strike down other Acts of Congress. Accordingly, there is a presumption that judicial review is available, unless it is clear that Congress intended that it would not.³⁸⁶ Nevertheless, U.S. courts have not followed this rationale and even acknowledged implicit privative clauses. For instance, in *United States v. Fausto*,³⁸⁷ the Supreme Court held that in passing the federal *Civil Service Reform Act*, and by its overall purpose, as opposed to any explicit indication to such effect, Congress intended to preclude judicial review of all of the agency’s decisions concerning disciplinary measures taken vis-à-vis federal civil servants. In contrast, British judges do not wield a general power to control the validity of primary legislation, although they have not been intimidated by privative clauses.³⁸⁸

U.S. courts have also been taken to the other extreme, particularly in the context of regulatory intervention. Thus, where an administrative institution is invested with the powers of a “legislative court”, the Supreme Court has not only presumed but required “Article III judicial review”.³⁸⁹ However, the notion of “legislative court” is not clear. It

³⁸³ *Administrative Procedures Act*, U.S.C., Chapter 5, § 704.

³⁸⁴ *Ibid.* § 701(a)(1) (1982).

³⁸⁵ § 701(a)(2).

³⁸⁶ *Franklin v. Massachusetts*, 505 U.S. 788 at 815, 821, n.21 (1992).

³⁸⁷ 484 U.S. 439 (1988).

³⁸⁸ *Anisminic Ltd. and Foreign Compensation Commission and Another*, [1969] 2 A.C. 147.

³⁸⁹ *Northern Pipeline*, *supra* note 52 at 69 n. 23.

alludes to non-coercive government action which in the view of some, should only be exercised by courts under their traditional common law powers. In such cases, some scholars have concluded that “Article III” review is required in all cases decided by non “Article III” federal tribunals.³⁹⁰ However, it is not clear if the exercise of judicial power in such cases is linked to the invalidity of the agency’s statute, or if it would allow judges to exercise *de novo* consideration of factual determination of an administrative agency without necessarily going as far as declaring the agency’s enabling statute unconstitutional. In any event, the right to judicial review in such cases would only be constitutionally protected if the institution making the determination were suspected of exercising a function that should properly belong to the judicial branch.

Another position argues that judicial review of administrative action is only constitutionally guaranteed when a person is the object of an administrative decision affecting his or her person or property, or when an administrative institution is exercising function that are seen as encroaching upon judicial power. This is based on the Fifth Amendment, which provides that no person shall be “deprived of life, liberty, or property, without due process of law”. The rationale illustrates a protective function of the judiciary from arbitrary action upon individuals, not for guaranteeing the rights provided in the Constitution, as implemented through legislation. This was the rationale behind many cases. Jaffe states that “when a person is the object of an administrative order which will be enforced by a writ levying upon his property or person, he is at some point entitled to a judicial test of legality.”³⁹¹ Equally, “when the United States levies directly upon property to satisfy a tax, or takes property under claim of title, the Court will insist that the legality of its claim be open to judicial review”.³⁹²

What follows is that when Congress enacts legislation creating “rights”, as opposed to that creating “obligations” such as the levying of taxes, judicial review must expressly be authorised. As the Supreme Court stated in *United States ex rel. Knauff v. Shaughnessy*,

³⁹⁰ R.H. Fallon Jr., “Of Legislative Courts, Administrative Agencies and Article III” 101 (1988) Harv. L.R. 915.

³⁹¹ Jaffe, *supra* note 116 at 384.

³⁹² *Ibid.* at 386.

in a case concerning the deportation of an alien “war wife” from the United States, “whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, *unless expressly authorized by law*, to review the determination of the political branch of the Government to exclude a given alien.”³⁹³ This position is related to other issues such as the rights of aliens under the Constitution and the political questions doctrine. On the other hand, it emphasises that in situations of “rights and privileges conferring legislation”, judicial review must be expressly authorised. This rationale can sometimes lead to strained reasoning. Thus, rather than quash the withdrawal of welfare benefits without any hearing as contrary to the specific statutory objectives, the Supreme Court justified the imposition of constitutional due process requirements because welfare benefits could be defined as “property” rather than a “gratuity”.³⁹⁴

These positions reflect a view expressed by Henry M. Hart Jr., who while concluding that *Marbury v. Madison* would have to be rethought if a question of law could validly be withdrawn from Article III jurisdiction,³⁹⁵ acknowledged that judicial review of administrative action was not constitutionally required in matters of “governmental benefits” and those “of grace”, that is, matters that do not involve the coercion of private individuals.³⁹⁶ Cass Sunstein has criticized it as reflecting a “pre-New Deal understanding of legal rights”.³⁹⁷ P. L. Strauss takes the opposite view, arguing against such a “positivist trap”, stating that the preclusion of judicial review of administrative action is legally possible, whereas review of legislation is not.³⁹⁸ Tribe seeks an intermediary position, by expressing scepticism about requiring review of all cases decided by non-Article III courts, while acknowledging that there is no reason why judicial review should not be extended to “new forms of property” such as “government largesse”.³⁹⁹

³⁹³ 338 U.S. 537 at 543 (1950) [emphasis added].

³⁹⁴ *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

³⁹⁵ Hart, *supra* note 42 at 1378-79.

³⁹⁶ *Ibid.* at 1386

³⁹⁷ C. Sunstein, “Standing and the Privatization of Public Law” (1988) 88 Colum. L. R. 1432 at 1440, n. 34.

³⁹⁸ P.L. Strauss, *Administrative Justice in the United States* (Durham, N.C.: Carolina Academic Press, 2002) at 339.

³⁹⁹ Tribe, *American Constitutional Law 2000*, *supra* note 49 at 291-92.

Indeed, Hart's position argues that because the Fifth Amendment only ensures due process when life, liberty and property are at stake, judicial review of administrative action should only be based on that clause. However, the Constitution includes other provisions and to argue that it is based on that clause exclusively is in sum saying that it is not based on the Constitution. Moreover, Hart's position does not purport to protect state autonomy because the distinction between statutes creating rights, and those affecting individual freedom such as taxation and private property, also applies to states through the Fourteenth Amendment. Arguably, the relevant question is not whether judicial review is a constitutional right but rather how judicial review can accommodate the varying types of discretion, without establishing a categorical position regarding the availability of judicial remedies, which has yet to be justified with regard to Justice Marshall's vision of judicial power applying to all cases coming under the Constitution.

2. Source of Superior Court Power to Review Administrative Action in Canada

Judicial power to set aside privative clauses has long affirmed the constitutionally inherent powers of provincial superior courts to review administrative action. Provincial superior court judges have assumed the constitutional power to review federal and provincial statutes by acknowledging their constitutional basis of power through the legal status of the judiciary defined in s. 96 of the *Constitution Act, 1867*.⁴⁰⁰ As such, privative clauses are legally ineffective as means of immunizing provincial and federal government action from judicial review.

a) Source of Provincial Superior Court Power in Review Capacity

Before the introduction of the *Charter*, an important body of authority emerged to deny any relation between the *Constitution Act, 1867* and the judicial review of administrative

⁴⁰⁰ R. Carter, "The Privative Clause in Canadian Administrative Law, 1944-1985: A Doctrinal Examination" (1986) 64 Can. Bar Rev. 241.

action. There had been many precedents illustrating the constitutional function of the judicial review of administrative action. The classical example is *Roncarelli v. Duplessis*,⁴⁰¹ concerning the actions of the Premier of Quebec, Maurice Duplessis, who had withdrawn, for personal and religious reasons, the liquor licence of a Montreal restaurant owner. Roncarelli's successful challenge illustrates the constitutional function of courts in reviewing executive action, although it confirmed the old common law principle that no individual is above the law, even the Premier of Quebec. Canadian courts as their English counterparts, had also managed to interpret privative clauses in a manner that enabled residual power of review. However, had Parliament or legislatures included a privative clause within legislation properly enacted by the appropriate level of government, Canadian courts would have been helpless.

No doubt, superior court judges would have benefited from distinguished academic support on this point. J. Willis stated "The *British North America Act* does not affect the law of judicial review of administrative action as such."⁴⁰² Hogg argued against founding the judicial review of administrative action in the Constitution, stating that s. 96 and related provisions of the *Constitution Act, 1867* concerning federal power to nominate judges was "too frail a foundation to support the building of a constitutionally grounded administrative law".⁴⁰³ In doing so, he argued that the judicial review of administrative action was not founded on the Constitution but in the common law. His argument, made in 1976, hinged on the fact that the Canadian constitution did not include a bill of rights, express or implied. Similarly, in 1979, D.P. Jones argued that although courts exercise an "inherent power" to determine the jurisdiction of administrative bodies, Parliament and the legislatures, as sovereign assemblies, are capable of withdrawing this power.⁴⁰⁴

However, the Supreme Court did not follow these positions and decided in *Crevier v. Quebec (A.G.)* that the review of administrative action is founded on the Constitution,

⁴⁰¹ [1959] S.C.R. 121 [*Roncarelli*].

⁴⁰² "Administrative Law in Canada" (1961) 39 Can. Bar. Rev. 250 at 255.

⁴⁰³ P.W. Hogg, "Is Judicial Review of Administrative Action Guaranteed by the British North America Act?" (1976) 54 Can. Bar Rev. 716 at 730.

⁴⁰⁴ D.P. Jones, "A Constitutionally Guaranteed Role for the Courts" (1979) 57 Can. Bar Rev. 669 at 675.

even before the introduction of the *Charter*.⁴⁰⁵ This case concerned an application to review a decision of an administrative tribunal. However, the statute of Quebec's Professions Tribunal precluded all judicial review of its decisions. Thus, in declaring the clause unconstitutional, the Supreme Court affirmed the inherent powers of superior courts to review administrative action. By ignoring the test set out in *Residential Tenancies Act*,⁴⁰⁶ Laskin C.J. determined the constitutionality of the privative clause on its own terms, thereby dissociating its validity from the constitutionality of the agency as an institution. This reasoning can be contrasted with U.S. constitutional law, which by assimilating severance to a "selective veto", analyses privative clauses and the constitutionality of administrative institution as co-substantive issues.⁴⁰⁷ Laskin's *ratio* is therefore that provincial privative clauses are objectionable not because they withdraw jurisdiction from superior courts, the creation of which requires federal nomination under s. 96, but because they confer unreviewable authority to an administrative tribunal.

Crevier is therefore essential for establishing a clear nexus between the judicial review of administrative action and the *Constitution Act, 1867*. However, Laskin C.J. sought to temper this nexus by stating that privative clauses could only be effective if they did not exclude review of "jurisdictional error". Laskin argued that questions of jurisdiction "are not far removed from issues of constitutionality".⁴⁰⁸ Subsequently, privative clauses that do not exclude review for "jurisdictional error" have been upheld.⁴⁰⁹ Nevertheless, the ratio in *Crevier* has been criticised because it breaks with the principle that it is the withdrawal of superior court jurisdiction, as opposed to the conferral of unreviewable authority, that should govern the validity of privative clauses.⁴¹⁰ This debate is important because the reasoning in *Crevier* would render both federal and provincial privative clauses vulnerable, as opposed to the latter exclusively, as traditionally had been the case. However, this debate is irrelevant as to the core of the ratio of this case, namely that the

⁴⁰⁵ *Crevier v. Quebec (A.G.)*, [1981] 2 S.C.R. 220 [*Crevier*].

⁴⁰⁶ *Supra*, note 265.

⁴⁰⁷ See above, A. PROHIBITION OF ARTICLE III "LEGISLATIVE COURTS" IN THE US CONSTITUTION.

⁴⁰⁸ *Crevier*, *supra* note 405 at 13.

⁴⁰⁹ *Capital Regional District v. Concerned Citizens of B.C.*, [1982] 2 S.C.R. 842; *Quebec (A.G.) v. Grondin*, [1983] 2 S.C.R. 364.

⁴¹⁰ Hogg, *Constitutional Law*, *supra* note at 7.3(f).

judicial review of administrative action is based on the Constitution. Thus, because it need not be authorised and may even imply the setting aside of legislation, *Crevier* demonstrates that the judicial review of administrative action forms part of the inherent powers of superior courts. By implication, the Canadian constitution does not allow for the creation of an autonomous jurisdictional order of administrative courts, whose rulings are immune from judicial intervention.

b) Nature of Superior Court Power under the *Charter*

When put into the new constitutional context, *Crevier* implies that the validity of privative clauses is just as much a question of judicial independence as it is one of individual rights.⁴¹¹ Thus, because the Constitution includes the *Canadian Charter of Rights and Freedoms*, this would by all means imply that the judicial review of administrative action is also grounded on the *Charter*. Naturally, s. 52(2)(b) states that the Constitution includes the *Canadian Charter of Rights and Freedoms*, and there is no reason to suggest that the foundations of administrative law exclude the *Charter*.

This inquiry can be furthered by asking if, by virtue of the Judicature provisions of the *Constitution Act, 1867*, the power to review administrative action can be qualified as “inherent”, to what extent is the power to review administrative action, and legislative action under the *Charter* also inherent? Gibson argues that “inherent” powers are necessarily “entrenched” powers because an inherent power cannot be taken away by legislation.⁴¹² Under this interpretation, review under the *Charter* would not be inherent because s. 33(1) can withdraw judicial powers of review under the *Charter*. In contrast, Huppé defines “inherent jurisdiction” as a “power which does not draw its existence in any formal rule of law, and which can only be structured in the scope of its exercise”.⁴¹³

⁴¹¹ See Elliot, “Rethinking S. 96”, *supra* note 60.

⁴¹² D. Gibson, “Monitoring Arbitrary Government Authority: *Charter* Scrutiny of Legislative, Executive and Judicial Privilege” (1998) 61 Sask. L. Rev. 297 at 306 [Gibson, “Monitoring”].

⁴¹³ “[P]ouvoir dont l’existence ne prend sa source dans aucune règle de droit formelle et dont seule la portée peut être encadrée par les règles de droit.” L. Huppé, *Le Régime juridique du pouvoir judiciaire* (Montréal:

Under this interpretation, judicial power of review under the *Charter* would be inherent, provided s. 33(1) limits not the existence of judicial scrutiny but the breadth of its exercise.

However, in spite of its inclusion in the Constitution of Canada, the *Charter* has been given a life of its own such that it has been conceptually separated from “inherent constitutional powers”. The concurring opinion of McLachlin and L’Heureux-Dubé JJ. in the *Speaker’s case* concerns the autonomy of the inherent powers of legislative assemblies and their relation to the *Charter*, but nevertheless illustrates the conceptual isolation of the constitutional rights from “inherent” constitutional powers. Their opinion stated that “inherent privileges” of legislative assemblies protect them from subservience to other parts of the Constitution such as the *Charter*.⁴¹⁴ McLachlin J. stated: “The *Charter* does not apply to the members of the Nova Scotia House of Assembly when they exercise their inherent privileges, since the inherent privileges of a legislative body such as the Nova Scotia House of Assembly enjoy constitutional status.”⁴¹⁵ Cory J. stated that judicial control does not threaten inherent legislative privileges if it limits control to the exercise of such privileges in accordance with the *Charter*, which should be distinguished from their existence. McLachlin J. stated that the case involved the existence of legislative privileges rather than their exercise. Nevertheless, in later cases, McLachlin J. recognized the possibility of “cross-pollenization”⁴¹⁶ between different parts of the Constitution. In *Harvey v. New Brunswick (A.G.)*, McLachlin J. later recognized in a concurring opinion: “Where apparent conflicts between different constitutional principles arise, the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them.”⁴¹⁷

Indeed, much of the argument that the judicial review of administrative action is legally based on the common law revolves around the notion of parliamentary sovereignty, and

Wilson & Lafleur, 2000) at 20 [Huppé, *Le Régime juridique du pouvoir judiciaire*]. One would prefer the term “written” to “formal” rule of law.

⁴¹⁴ *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 S.C.R. 319.

⁴¹⁵ *Ibid.* at 368.

⁴¹⁶ Expression of D. Gibson, “Monitoring”, *supra* note 412 at 314.

⁴¹⁷ *Harvey v. New Brunswick (A.G.)*, [1996] 2 S.C.R. 876 at 917.

ultimately implies that the availability of judicial review of administrative action is subject to statutory prohibition. On the one hand, the notwithstanding clause – s. 33(1) – confirms that the *Charter* does not break with this tradition. However, it only limits review to certain specific rights (ss. 2 and 7 to 15); not all rights in the *Charter* are subject to s. 33(1) override. In addition, rights not overridden are not immune from review. This implies that a statute enacted notwithstanding s. 2 can nevertheless be reviewed under s. 15. Moreover, invoking the notwithstanding clause does not bring with it an implicit privative clause; administrative authorities must always draw their power from statute. The exercise of power under that statute could also be reviewed under s. 15 or any other right not overridden. Lastly, the argument could also be made that even if Parliament or a legislature were to invoke the combined effect of both s. 33(1) and a privative clause, the jurisdiction of superior courts could only be removed as to the former, that is, in controlling the compatibility of the legislation with regard to certain *Charter* rights, notwithstanding jurisdiction to determine whether s. 33(1) was properly invoked. In this respect, parliamentary sovereignty, outside the invocation of s. 33(1), is generally irrelevant. It is therefore possible to conclude, as did the Supreme Court in the *Secession reference*, that “with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy.”⁴¹⁸ However, *Crevier* demonstrates that the notion of constitutional supremacy was initiated before the *Charter* and that s. 33(1) must be reconciled with other constitutional imperatives such as the inherent power to review administrative action.

c) Source of Provincial Superior Court Power as Appellate Jurisdiction

Superior court judges can be called upon to participate in the administrative process through two techniques. First, as *persona designata* in which they will act in their

⁴¹⁸ *Secession Reference*, *supra* note 375 at 258.

personal capacity and lose their superior court powers. Conversely, superior courts can be designated by Parliament or the legislatures to have a role to play in the administrative process by acting as appellate bodies for governmental decisions. In contrast, this does not diminish the powers of superior courts, but generally increases them by enabling them to substitute their decision to that of the preceding authority. However, even in cases where delegations of power are institutional rather than personal, superior court judges exercising appellate authority have been qualified as *de jure* administrative tribunals, with correlative restrictions of power, rather than as superior courts exercising appellate powers.

In *R. v. Hoepfner*,⁴¹⁹ while acting as appellate body of an administrative decision, the Manitoba Court of Appeal held that as it was hearing an appeal on any question of law from a review board established under the mental health provisions of the *Criminal Code*, it had authority to deal with the *Charter* issue pertaining to the detention of the detainee, even though the review board could not. In justifying its consideration of constitutional issues, the Court of Appeal referred to the comments made by La Forest J. in *Tétrault-Gadoury*, stating that on appeal, the umpire having jurisdiction to decide any question of law should deal with any constitutional issue relevant for consideration. Thus, since the Court of Appeal was acting in its appellate powers, as opposed to its review powers, it decided that the *Tétrault-Gadoury* precedent applied, and therefore that it had jurisdiction to hear the constitutional issue.

This position reflects the general idea that judges, when acting in their appellate capacity, are not acting as judges but as “administrative tribunals”. Thus, the Supreme Court has described itself as an “appeal tribunal” when acting in appellate capacity.⁴²⁰ However, it is important not to confuse the function of appellate jurisdictions, with its institutional powers as a Superior Court of Record with inherent constitutional powers, regardless of its acting in appellate or review capacity. Such confusion stems from an amalgamation between the legal status of the appellate authority and the function being exercised.

⁴¹⁹ (1999), 134 Man. R. (2d) 193 (C.A.), rev’d on other grounds, [1999] 3 S.C.R. xi.

⁴²⁰ See *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 [*Pezim*].

However, it is highly questionable that the source of judicial power should be weakened by the nature of functions being exercised. When granted to a superior court, appellate jurisdiction can therefore be seen as an additional granting of power, that to substitute one decision to that of the preceding administrative authority, in addition to the original source of power under which the appellate authority is legally responsible. As such, reference to *Tétrault-Gadoury* is unnecessary and highly questionable since the appellate body in that case was not a superior court of record but a mere statutory authority.

B. SOURCE OF FEDERAL COURT POWER

The source of federal court power to review administrative action and even legislation is far from clear. To begin, it is established that the Federal Court does not wield “core” or “inherent” judicial functions.⁴²¹ As a result, because it is limited both by s. 101 of the *Constitution Act, 1867* to matters concerning “laws of Canada” (i.e. federal matters), and by the terms of the *Federal Courts Act*,⁴²² the Federal Court would be closer to inferior courts and administrative tribunals, which by definition, wield limited jurisdiction. This rationale is not without its consequences for the interpretation of Federal Court powers under the Constitution. On the one hand, the minimisation of Federal Court power, expounded by Laskin C.J., is based on a desire to protect the unitary nature of the Canadian judicial system. Thus, by limiting the powers of the Federal Court, the federalist rationale seeks to avoid duplicating provincial superior court powers.⁴²³ On the other hand, because provincial privative clauses and other means of precluding review may indirectly impinge on federal powers over judicial nominations (s. 96 of the *Constitution Act, 1867*), the federalist rationale sees few limits that can be placed on Federal Court powers, particularly if the federal government cannot impinge upon its

⁴²¹ *Re Young Offenders Act*, [1991] 1 S.C.R. 252.

⁴²² *Supra* note 368.

⁴²³ R. Sharpe & J.B. Laskin, “Constricting Federal Court Jurisdiction: a Comment on Fuller Construction” (1980) 30 U.T.L.J. 283.

own powers of nomination by enacting privative clauses. Accordingly, the Federal Court should not have full powers under the Constitution, as provincial superior courts.

However, this interpretation of federal court powers, particularly since the enactment of the *Charter*, is not satisfactory. Hogg states that the Federal Courts are “superior courts”,⁴²⁴ although they do not possess “inherent” jurisdiction.⁴²⁵ He argues that Federal Court jurisdiction can be limited by privative clauses in “jurisdictional matters”, while acknowledging that the distinction between jurisdictional and non-jurisdictional errors is one of the most elusive in Canadian public law. In this respect, it is not clear whether and on what basis Hogg would allow the Federal Court to set aside privative clauses that limit its jurisdiction, even in matters concerning “laws of Canada”. Similarly, Strayer argues that review of federal action may be required by some court – not necessarily a provincial superior court, whether it involves a constitutional issue (federalism or *Charter*) notwithstanding the existence of a federal privative clause.⁴²⁶ However, he distinguishes between constitutional jurisdiction and common law jurisdiction and states that only the former should be guaranteed by the Federal Court.⁴²⁷ Thus, he argues that neither Parliament nor the legislatures may exclude review of constitutional issues, while Parliament may exclude review of jurisdictional issues. However, like Hogg, Strayer is not comfortable with the notion of jurisdiction, as distinguished from constitutionality.⁴²⁸

Both positions can be criticised because they confuse “inherent jurisdiction” with “general jurisdiction” and hence interpret the inherent jurisdiction of provincial superior courts as an absolute and the lack of general jurisdiction of the Federal Court as a hindrance on its own constitutional power, even in matters regarding the review of federal administrative action.

⁴²⁴ Hogg, *Constitutional Law*, *supra* note 9 at 7.2(e).

⁴²⁵ *Ibid.* at 7.2(b).

⁴²⁶ Strayer, “Canadian Constitution”, *supra* note 2 at 94.

⁴²⁷ *Ibid.* at 97.

⁴²⁸ *Ibid.* at 91.

1. Nature of Federal Court Jurisdiction

Identifying the nature of Federal Court jurisdiction starts with the competing rationales for interpreting the *Judicature* provisions in the *Constitution Act, 1867* as either applying to both provincial superior courts and the Federal Courts or exclusively to the former. The Constitution is not conclusive on this point.⁴²⁹ To this, one might add the ambiguous status of the Federal Courts as statutory courts, in contradistinction to provincial superior courts which are characterised as “common law courts”. This difference does not affect the day-to-day functioning of the Federal Courts, but suggests that their powers are not as flexible as those of provincial superior courts since the former must be carved out from those of provincial superior courts. Aside from this, both provincial and Federal Courts derive their powers from the *Constitution Act, 1867*. The main distinguishing point between the Federal Courts and superior courts is the scope of their jurisdiction, the Federal Courts being limited by s. 101 of the *Constitution Act, 1867* to matters regarding “laws of Canada”, i.e. federal legislation and federal administrative action, in contrast to superior courts, which not knowing of such limits have traditionally been defined as courts of “inherent jurisdiction”.

The question therefore arises: how should these two factors affect the Federal Courts’ power under the *Charter*? In theory, there appears to be no reason to argue that the Federal Courts’ should have diminished powers under the *Charter*, although their statutory nature, and lack of inherent jurisdiction have prompted much uncertainty on this point.

a) Distinction between Common Law and Statutory Courts

The Federal Courts are generally analysed as temporary institutions with no other powers than those defined in their statute. In contrast, it is generally accepted that superior courts in Canada are their own progenitors, or at least created by unwritten law. As “common

⁴²⁹ See above, B. INDEPENDENCE OF INSTITUTIONS EXERCISING “SUPERIOR COURT” FUNCTIONS IN CANADA.

law courts”, they can be distinguished from “statutory courts”, which are “a product of convention rather than nature, of statute rather than common law”.⁴³⁰ However, it is more difficult to make a distinction between common law and statutory courts when considering the distinction through the lens of history. Indeed, the historical evolution of the powers of “common law courts”, in the U.K. as in Canada, is the result of the combined intervention of Parliament and legislative assemblies.⁴³¹ It is therefore difficult, and not very useful, to distinguish courts, particularly those in Canada, by the form of their origins, in either written or unwritten law.

In the UK, with the growing political weight of Parliament, the Crown lost its power to create “prerogative courts” in 1643.⁴³² This implied that all courts thenceforth derived their power from both legislation and prerogative power: Parliament created the court; the Crown appointed the judges. This division of labour implicitly prevented either body from wielding exclusive power over the judiciary. Thus, while the creation of courts is the result of legislative action, the appointment of judges is a prerogative power. This division of power was consecrated in Canada through s. 92(14) and 96 of the *Constitution Act, 1867* although it reflects consistent practice. Before Confederation, Canadian courts, as those of other colonies, were the combined result of Imperial legislation and prerogative power.⁴³³ Thus, even prior to 1867, “common law courts” owed their existence to Parliament or to the legislative assemblies of each province.⁴³⁴

However, superior courts in Canada are portrayed as the exclusive product of history, or at least royal prerogative, and therefore of permanent status since they are not subject to the whim of Parliament or the legislatures. Thus, L. Huppé speaks of the “fonction permanente” of common law courts.⁴³⁵ This refers to the idea that there must always be a

⁴³⁰ P. Russel, *The Jurisdiction of the Supreme Court of Canada* (1968) 6 O.H.L.J. 1 at 35; cited in N. Vallières, D. Lemieux, “Le fondement constitutionnel du pouvoir de contrôle judiciaire exercé par la Cour fédérale du Canada” (1975) 2 Dal. L.J. 268 at 303 [Vallières and Lemieux].

⁴³¹ *Ibid.*

⁴³² L.L. Jaffe, E. Henderson, “Judicial Review and the Rule of Law: Historical Origins” (1956) 72 L.Q. Rev. 345 at 355.

⁴³³ J.E. Cote, “The Reception of English Law” (1977) 15 Alta. L.R. 29 at 52.

⁴³⁴ Vallières and Lemieux at 285. See also G. Ledain, “The Supervisory Jurisdiction in Quebec” (1957) 35 Can. Bar. Rev. 788.

⁴³⁵ L. Huppé, *Le Régime juridique du pouvoir judiciaire*, *supra* note 413 at 9.

court for individuals to obtain redress. In a legal system founded on the rule of law, there can be no right without a remedy. As such, because of the multiplication of inferior courts and administrative tribunals, common law courts maintain the coherence and integrity of the judicial system. The implications of this argument can be illustrated through the *Manitoba Language Reference*. In this case, it was argued that even though all of the province's laws were invalid, this did not invalidate its superior courts since they were common law jurisdictions and therefore not subject to the fate of legislative enactments, and thereby maintain legal continuity.⁴³⁶ However, such a far reaching argument was not necessary in this case. For one, if superior courts were to survive a wholesale invalidation of all statutes, they would do so as "prerogative courts", thereby breaking with long established historical precedent. Thus the remedy in this case was the suspension of invalidity, pending the correction of legislative errors. In this respect, provincial superior courts can be distinguished from the Federal Courts more as consistent political facts of the Canadian Constitution. In contrast, the Federal Courts do not benefit from such historical legitimacy. Thus, the permanence of common law courts reflects the continuity of the Crown and its courts but does not distinguish the nature of their power from that of the Federal Courts.

Some have even sought to take the argument further by arguing that the Federal Court should be provided with a permanent status, akin to that of provincial superior courts. Thus, in arguing that they are not subject to the will of Parliament and the legislatures, K. Benyekhlef states that s. 101 courts should benefit from the same guarantees of independence as s. 96 courts in order to preserve the unity of judicial independence.⁴³⁷ However, this is taking the argument further than necessary given that there is no inherent need for the Federal Courts, their existence is not essential to the functioning of

⁴³⁵ Gibson, "Monitoring", *supra* note 412 at 11.

⁴³⁶ *Manitoba Language Reference*, *supra* note 370. S.A. Scott, Factum of Alliance Québec, Alliance for Language Communities in Quebec (Alliance Québec, Alliance pour les communautés linguistiques au Québec), in the *Matter of a Reference by the Governor in Council concerning Language Rights under s. 23 of the Manitoba Act and section 133 of the Constitution Act, 1867* and set out in Order in Council P.C. 1984-1136 dated the 5th day of April 1984 at 31.

⁴³⁷ *Les garanties constitutionnelles relatives à l'indépendance du pouvoir judiciaire au Canada* (Montréal: Yvon Blais, 1988) at 45.

the judicial system: Federal Court jurisdiction would automatically be subsumed into provincial superior courts in the advent of their disappearance.

Nevertheless, it remains difficult to distinguish the Federal Courts from provincial superior courts by describing their jurisdiction as respectively of “statutory” and of “common law” nature. All judges are appointed by the Crown and provincial superior courts nevertheless are limited, if only territorially in their jurisdiction, and this since Confederation. S. 92(14) of the *Constitution Act, 1867* provides that power to constitute courts, including superior courts, is vested in the provinces. As Huppé states: “C’est aux législatures provinciales qu’il incombe de définir la compétence des tribunaux de droit commun et de leurs juges, et ce, pour tous les aspects de leur compétence.”⁴³⁸ Thus, both provincial superior courts and the Federal Courts can be described as “statutory courts”; neither provide personal power to judges independently from an institutional framework. This enables D. Gibson to conclude:

“Courts also derive their existence, and hence their authority, from statute. No court in Canada can boast either spontaneous or constitutional conception. Although the powers and privileges of certain courts, once established, are “inherent”, in the sense that they do not have to be spelled out in legislation, a legislative enactment is required to bring every court into being in the first place, and authorize, either thereby or subsequently, its jurisdiction over particular types of disputes.”⁴³⁹

Thus, the statutory nature of the Federal Courts is not exclusive, nor exceptional. Their the statutory nature cannot be used as grounds for limiting their power under the *Charter*.

b) Distinction between General and Inherent Jurisdiction

Notions of “inherent”, “implied” and “general jurisdiction” have traditionally been treated synonymously in Canada. For instance, in *Canada (Human Rights Commission) v.*

⁴³⁸ L. Huppé, *Le Régime juridique du pouvoir judiciaire*, *supra* note 413 at 9.

⁴³⁹ Gibson, “Monitoring” *supra* note 412 at 320.

Canadian Liberty Net,⁴⁴⁰ the Supreme Court unanimously ruled that “The court which benefits from the inherent jurisdiction is the court of general jurisdiction, namely, the provincial superior court.”⁴⁴¹

Following a complaint before the Canadian Human Rights Commission, and pending its adjudication before the Tribunal, the Commission requested a preliminary injunction from the Federal Court prohibiting *Canadian Liberty Net* from using racist telephone messages on its answering services. The problem in this case arose because the Federal Court is not a court of general jurisdiction, and therefore its powers are limited to those defined in the then-*Federal Court Act*. Indeed, these provisions did not expressly mention the power to grant injunctive relief in favor of the Canadian Human Rights Commission. The Federal Court, Trial Division, granted the injunction, which was disobeyed by Canadian Liberty Net, thereby finding itself in contempt. The Federal Court of Appeal affirmed the finding of contempt, but stated that the Trial Division had no jurisdiction to issue such preliminary injunctions since the power to issue such orders was vested in the general injunctive powers of the Federal Court of Appeal under s. 44.⁴⁴² In doing so, it described itself as a “superior court” with powers to issue injunctions but not as one of general jurisdiction.⁴⁴³

The Supreme Court did not go this far. It stated that the notion of “inherent” jurisdiction was synonymous with that of “general jurisdiction”. The majority stated that the Federal Court had the power to issue injunctions for the enforcement of the *Canadian Human Rights Act* that resulted from a purposive interpretation of s. 44 of the *Federal Court Act*, although it does not have inherent or implied jurisdiction to do so. The minority (McLachlin and Major JJ.) agreed that the Federal Court did not have implied or inherent jurisdiction, but in contrast, went further by stating that the *Federal Court Act* could not be interpreted as granting such injunctive power in favor of the Commission, a power that

⁴⁴⁰ [1998] 1 S.C.R. 626 [*Liberty Net*].

⁴⁴¹ *Ibid.* at 658.

⁴⁴² *Canada (Human Rights Commission) v. Canadian Liberty Net* [1994] 3 F.C. 551 (C.A.).

⁴⁴³ The Federal Court, Trial Division, also stated that it wields “implied, essential or necessary power to deal with contempt”. *Telus Mobility v. Telecommunications Workers Union* (2002), 220 F.T.R. 291 at 294 (T.D.), *aff’d* (2004), 317 N.R. 317 (C.A.).

properly belonged to provincial superior courts.⁴⁴⁴ Thus, for the majority, the basis for allowing the Federal Court to grant a preliminary injunction and punishing contempt was not rooted in the very existence of the Federal Court, as a superior court but rather in its interpretation of s. 44 of the *Federal Court Act*, which provided the Federal Court of Appeal to provide “any such order”.⁴⁴⁵ Thus, this should be interpreted so as to allow the Federal Court to fulfill its mandate as principle review organ in federal matters.

The ruling in *Canadian Liberty Net* confirms the traditional association of inherent and general jurisdiction. By definition, superior courts are defined as having inherent jurisdiction which implies that they possess plenary powers as to remedies they can provide. Inferior courts, being limited by law with regard to the area, persons or subject matter over which they exercise jurisdiction, can therefore only provide remedies listed in their statute.⁴⁴⁶ The term “inherent” in this case is used as a synonym for “implied” but also “general original jurisdiction”. Thus, it is said that only superior courts have “inherent” jurisdiction to exercise judicial review, in contrast to the Federal Courts, the jurisdiction of which is limited by s. 101 of the *Constitution Act, 1867* to matters concerning the “laws of Canada”, and more specifically federal matters defined in the *Federal Courts Act*. Federal courts therefore do not have “inherent jurisdiction” as do superior courts created pursuant to s. 96 of the *Constitution Act, 1867* and are limited in the remedies they can issue.⁴⁴⁷

The overlap between notions of “inherent” judicial power of superior courts, and their general original jurisdiction could stem from the fact that the UK does not provide any “federal power”, let alone any federal judicial power or any inherent judicial power to set aside legislation. However, the “inherent jurisdiction” of British superior courts has

⁴⁴⁴ The minority, while concluding that the Federal Court did not have the power to issue such an order, nevertheless agreed with the majority regarding its finding of *Canadian Liberty Net* in contempt. See *Liberty Net*, *supra* note 440 at 678.

⁴⁴⁵ “In addition to any other relief that the Court may grant or award, a mandamus, injunction or order for specific performance may be granted or a receiver appointed by the Court in all cases in which it appears to the Court to be just or convenient to do so, and *any such order may be made* either unconditionally or on such terms and conditions as the Court deems just.” *Federal Court Act*, *supra* note 368 [emphasis added].

⁴⁴⁶ Rubinstein, *supra* note 248 at 11.

⁴⁴⁷ See s. 18 of the *Federal Courts Act*, *supra* note 368 for the list of remedies available before the Federal Court, whereas s. 28(1) does not list any remedies available before the Federal Court of Appeal.

consistently been dissociated from their “general jurisdiction” because it is limited to those matters that have not been taken away by enactments.⁴⁴⁸ In contrast, in the United States, the term “inherent” has implied a power necessarily granted by the Constitution, one that defined the “very essence of judicial duty”.⁴⁴⁹ Nevertheless, while s. 101 of the *Constitution Act, 1867* can be read as a limit on superior court general jurisdiction, Canadian jurists, having adopted both the English definition of “superior court” as a court of unlimited original jurisdiction and the American notion of “inherent judicial power” as powers necessarily flowing from the Constitution, have concluded that because the Federal Courts do not have general original jurisdiction, they do not have full powers under the *Charter*, even in matters within federal jurisdiction.

However, while it is clear that s. 101 of the *Constitution Act, 1867* requires that Federal Court powers be horizontally limited to matters relating to “laws of Canada”, it is open to question why one should draw any vertical limits to its powers to rule on constitutional issues, both in matters regarding federal legislation and administrative action. On the one hand, the argument to the contrary is that the Federal Courts have specifically been defined powers in the *Federal Courts Act*. In addition, not only are its powers limited by their statutory nature, they are also limited by the concepts referred to in the *Act*, such as review for “error on the face of the record”,⁴⁵⁰ and the various prerogative writs. On the other, these concepts are increasingly difficult to reconcile with the extension of provincial superior court powers of review over all errors.⁴⁵¹ Moreover, already in 1980, Dickson J. criticised the definition of powers in the then-*Federal Court Act* as having “tended to crystallise the law of judicial review at a time when significant changes were occurring in other countries with respect to the scope and grounds for review.”⁴⁵² This criticism is all the more relevant with the constitutional changes of 1982, changes which have yet to receive official consecration as far as Federal Court powers are concerned since none of the grounds of review listed ins. 18(4) explicitly refers to the *Charter*.

⁴⁴⁸ I.H. Jacob, “The Inherent Jurisdiction of the Court” (1970) 23 Current Legal Problems 23; K. Mason, “The Inherent Jurisdiction of the Court” (1983) 57 Australian Law Journal 449.

⁴⁴⁹ *Marbury*, *supra* note 382.

⁴⁵⁰ S. 18(4)(c).

⁴⁵¹ *Baker*, *supra* note 169.

⁴⁵² *Martineau v. Matsqui Institution (Disciplinary Board)*, [1980] 1 S.C.R. 602 at 615. See also Roach, *Remedies*, *supra* note 37 at 640.

2. Effect on Federal Court Powers under the Constitution

At the outset, even though it benefits from the same guarantees of independence of provincial superior courts, there is still doubt as to whether the Federal Courts have jurisdiction in the context of an application for judicial review of a decision or order to issue a bare declaration that federal legislation is unconstitutional.⁴⁵³

There have been many theories seeking to limit and justify the limitation of Federal Court powers under the Constitution, even within the context of matters relating to “laws of Canada”. The first is the suggestion that that judicial review of administrative action by provincial superior courts is grounded on the Constitution not because privative clauses confer unreviewable authority upon administrative authorities, but because they take away “core judicial functions” of provincial superior courts. As a result, the conferral of exclusive jurisdiction to the Federal Court can also be interpreted as a withdrawal of provincial superior court power, a power which nevertheless must remain in check. Moreover, because the Federal Court is a statutory court, its powers are subject to the *lex posterior* principle. Accordingly, some rulings have upheld a federal privative clause, even on “jurisdictional grounds”, of decisions of the federal Immigration Appeal Board.⁴⁵⁴

The implications of these restrictive interpretations for were eventually felt regarding Federal Court powers under the *Charter*. In *Singh v. Canada*, the Supreme Court stated that the Federal Court was limited in its remedial power and hence not a full “court of competent jurisdiction” for the purposes of s. 24(1), a rationale later transposed to

⁴⁵³ *Canada (A.G.) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 322-26 [a.k.a. *Jabour*]; *Pearson v. Canada (Canadian Radio-Television Telecommunications Commission)* (1997), 48 Admin. L.R. (2d) 257 at 263-64 (Alta. C.A.), appeal to S.C.C. discontinued, [1998] 2 S.C.R. vi. See also Mullan, *Administrative Law*, *supra* note 10 at 428-29.

⁴⁵⁴ *Pringle v. Fraser*, [1972] S.C.R. 821.

administrative tribunals.⁴⁵⁵ Indeed, it is one thing to say that provincial superior courts have inherent jurisdiction, and another to say that their inherent power restricts that of the Federal Court. For many, the inherent powers of provincial superior courts have been understood through an “hour-glass” analogy, whereby the affirmation of inherent superior court jurisdiction has implied a correlative restriction of Federal Court powers to address constitutional issues.

a) Limitation of Federal Court Power by Provincial Superior Courts

Initially, the Supreme Court recognised the non-exclusive jurisdiction of the Federal Court to review the constitutionality of legislation and administrative action. Thus, the *Federal Court Act*, which provides exclusive jurisdiction to the Federal Court in matters of judicial review of federal administrative decisions, was recognised as valid only where review does not concern questions of constitutionality.⁴⁵⁶ However, this implied limitations on Federal Court powers under the Constitution, even in matters conceivably within federal jurisdiction.

Initially, restrictions on Federal Court power were justified in the sacrosanct nature of provincial superior court power.⁴⁵⁷ This principle was confirmed in the context of federalism, but it has been extended to *Charter* cases, which implied that the federal and provincial Superior Courts have concurrent jurisdiction in constitutional matters.⁴⁵⁸ Thus, in *Jabour*, the Supreme Court ruled that the Federal Court could not be granted exclusive jurisdiction over the determination of the constitutionality of federal statutes and hence the *Federal Court Act* could not be interpreted as excluding the power of superior

⁴⁵⁵ [1985] 1 S.C.R. 177 at 222 [*Singh*]. See B. ADMINISTRATIVE POWER UNDER S. 24(1) OF THE *CHARTER*.

⁴⁵⁶ *Canada (A.G.) v. Canard*, [1976] 1 S.C.R. 170 at 202; *Canada (Labour Relations Board) v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147 at 154 [*Paul L'Anglais*].

⁴⁵⁷ *Jabour*, *supra* note 453.; *Paul L'Anglais* *ibid*.

⁴⁵⁸ *Reza v. Canada*, [1994] 2 S.C.R. 394 [*Reza*]; *Kourtessis v. M. N.R.*, [1993] 2 S.C.R. 53 at 113-14, per Sopinka J.

courts.⁴⁵⁹ This was taken further in *Paul l'Anglais*, where the Court ruled that the Federal Court's non-exclusive jurisdiction applied not only to primary legislation but to all federal administrative decisions subject to an application for judicial review on constitutional grounds.⁴⁶⁰ This case concerned the review of decision of a federal labour relations board on the grounds that the activities in question fell outside the jurisdiction of Parliament. The Supreme Court held that because judicial review had been applied for on constitutional grounds, the provincial superior court had properly been seized. However, recognising the inherent powers of provincial superior courts over the Federal Court raised questions regarding the effects of a Federal Court ruling. L. Huppé argued that even though it does not wield inherent jurisdiction, the Federal Court can rule on its own powers without being subject to the inherent powers of review of common law courts.⁴⁶¹

Nevertheless, in other cases recognizing the constitutionality of the Federal Court, the Supreme Court was not clear on its status in the Canadian judicial system and correlatively on its powers under the Constitution. In *Northern Telecom No. 2*,⁴⁶² the Supreme Court ruled that the power of the Federal Court to consider the constitutionality of legislation did not impinge upon the provincial jurisdiction of Superior Courts. This case concerned the jurisdiction of the Canada Labour Relations Board to certify a union installing equipment produced by Northern Telecom, affiliate of Bell Canada, into Bell Canada's federally regulated telecommunications network. Depending on which company the employees are working for, they will fall either in provincial or federal jurisdiction. The Board made a reference to the Federal Court, pursuant to s. 28(4) of the *Federal Court Act*, which triggered the issue of the constitutional validity of that provision and the powers of the Federal Court to deal with constitutional issues.

The Court unanimously ruled that the s. 28(4) of the *Federal Court Act* was constitutional and that the Federal Court had the power to decide the issue. However, the rationale used to come to this conclusion was not clear. On the one hand, the power seemed to derive

⁴⁵⁹ *Jabour*, *supra* note 453.

⁴⁶⁰ *Paul l'Anglais*, *supra* note 456.

⁴⁶¹ L. Huppé, *Le Régime juridique du pouvoir judiciaire*, *supra* note 413 at 50.

⁴⁶² *Supra* note 80.

from the Constitution, and that the Federal Court held its powers under the Constitution, as provincial superior courts, but that it was limited in the type of claims it could hear – e.g. those concerning federal government action. As the court noted: “It is inherent in a federal system such as that established under the *Constitution Act*, that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments, as well as to police agencies within each of these spheres to ensure their operations remain within their statutory boundaries. Both duties of course fall upon the courts when acting within their own proper jurisdiction.”⁴⁶³ Accordingly, the court quoted the Attorney General approvingly, as saying: “the Federal Court of Appeal is competent to decide a question of law, even of a constitutional nature, when that question is raised, as it is in the case at bar, in connection with a proceeding or principal action based on the application of federal law.”⁴⁶⁴

On the other hand, the Court simultaneously conceded the opposite, namely that its power derived not from the Constitution, but from the Federal Court’s empowering statute. Accordingly, it was not on the same footing as superior courts, even when deciding whether the federal government had acted within its jurisdiction. As the Court stated: “the Federal Court is in the same position as any statutory court, provincial or federal, and therefore can determine the constitutional issue arising as a threshold question in the review of the administrative action in issue.”⁴⁶⁵ Moreover, because the court did not have general jurisdiction, as do superior courts, it does not have the power to interpret the Constitution. In its words: “The *Constitution Act, 1867*, as amended, is not of course a “law of Canada” in the sense of the foregoing cases because it was not enacted by the Parliament of Canada. The inherent limitation placed by s. 101 on the jurisdiction which may be granted to the Federal Court by Parliament therefore might exclude a proceeding founded on the *Constitution Act*.”⁴⁶⁶ However, this was not the issue in this case, which case was “concerned with a proceeding that originates in the

⁴⁶³ *Ibid.* at 741.

⁴⁶⁴ *Ibid.* at 745.

⁴⁶⁵ *Ibid.* at 744.

⁴⁶⁶ *Ibid.* at 745.

Canada Labour Code and in which is raised a question as to the reach and applicability of that federal statute under the Constitution (...).”⁴⁶⁷

The notion that the Constitution of Canada is not a “law of Canada” which the Federal Court can interpret has had important debilitating effects on its jurisdiction, particularly where the *Charter* has been concerned. Generally, the test for Federal Court jurisdiction was set out in *Quebec North Shore Paper Co. v. Canadian Pacific*,⁴⁶⁸ where the Supreme Court listed three cumulative requirements: (1) Parliament must have jurisdiction over the matter; (2) the *Federal Court Act* must confer jurisdiction over the case; (3) the issues of the case must be governed by “existing federal law”,⁴⁶⁹ i.e. they must be governed by federal statute law, not common law. In applying these conditions, the Supreme Court stated that the Federal Court does not have jurisdiction in interpreting the Constitution since it is not a “law of Canada”. In interpreting these conditions, the Federal Court ruled that privative clauses could restrict Federal Court jurisdiction, even in constitutional matters.⁴⁷⁰

However, the matter has been taken further by holding that the *Charter* does not confer on the Federal Courts any new jurisdiction and that it is not a “law of Canada” which the Federal Courts can interpret. Following the Supreme Court’s position in *Northern Telecom*, the Federal Court ruled in *Southam Inc. v. Canada (Attorney General)*, that it could not interpret the *Charter* because it was not a “law of Canada”. In this case, the Senate had denied access to members of the press, which prompted an application for judicial review in Federal Court, on grounds of violation of s. 2(b) of the *Charter*. Iacobucci J. ruled that the Federal Court did not have jurisdiction to rule on the issue, and because it did not have jurisdiction to rule on the issue, s. 24(1) of the *Charter* could not confer on the court any new jurisdiction.⁴⁷¹ Basing himself on *R. v. Mills*,⁴⁷² Iacobucci J. A. confirmed that the *Charter* does not confer jurisdiction:

⁴⁶⁷ *Ibid.*

⁴⁶⁸ [1977] 2 S.C.R. 1054 [*Quebec North Shore*].

⁴⁶⁹ *Ibid.* at 1055-56.

⁴⁷⁰ *Brink’s Canada v. Canada Labour Relations Board*, [1985] 1 F.C. 898 (T.D.).

⁴⁷¹ *Southam Inc. v. Canada (Attorney General)*, [1990] 3 F.C. 465 (C.A.) [*Canada v. Southam*].

⁴⁷² *Mills*, *supra* note 35 at 964-65.

“Although subsection 24(1) of the *Charter* speaks of a court of competent jurisdiction where a remedy can be sought to enforce a *Charter* breach, that section and the *Charter* generally have not conferred any jurisdiction on any court that it did not already possess.”⁴⁷³

Again, in *Kigowa v. Canada*, the Federal Court of Appeal stated “the courts have decided that the *Constitution Acts, 1867 to 1982*, and therefore the *Charter*, not having been enacted by the Parliament of Canada, is not a ‘law of Canada’ within the meaning of section 101, the Court would therefore have lacked jurisdiction to hear this case on that ground alone”.⁴⁷⁴

While many authors have emphasised the powers of the Federal Court in constitutional matters, there is still an undercurrent of hostility to the granting of providing the Federal Court with full powers under the *Charter*, even where this is restricted to federal administrative action. Hogg says that the Federal Court has the power and duty to determine the constitutionality of legislation when the validity of such laws are challenged.⁴⁷⁵ However, G. Otis argues that the Federal Court has the power to address constitutional issues, but does not have the power to award damages for violation of the *Charter*.⁴⁷⁶ He states that the *Charter* does not confer on the Federal Court any new jurisdiction and therefore that the Federal Court can only award damages in tort for violation of a federal law, not the *Charter*. Otis therefore takes the view that the *Charter* cannot be regarded as a “law of Canada” for the purposes of s. 101 of the *Constitution Act, 1867* and therefore does not qualify as a “existing federal law” for the purposes of Federal Court jurisdiction.⁴⁷⁷ Thus, in his view, s. 24(1) gives rise to an obligation, “purely constitutional” in its origin, and does not confer any power on the Federal Court since it draws its powers from statute. Provincial superior courts are therefore exclusively

⁴⁷³ *Ibid.* at 474. See also above: B. ADMINISTRATIVE POWER UNDER S. 24(1) OF THE CHARTER and c) Distinction between Review of Reasons and Review of Decisions, for discussion on the evolutionary nature of the notion of jurisdiction.

⁴⁷⁴ *Kigowa v. Canada*, [1990] 1 F.C. 804 at 805 (C.A.) [*Kigowa*].

⁴⁷⁵ Hogg, *Constitutional Law* at 7.2(b).

⁴⁷⁶ G. Otis, “Les Obstacles constitutionnels à la juridiction de la cour fédérale en matière de responsabilité publique pour violation de la Charte canadienne” (1992) 71 Can. Bar Rev. 647 [Otis, “Obstacles”].

⁴⁷⁷ *Ibid.* at 659.

empowered to consider monetary claims based where the *Charter* has been infringed. Nevertheless, Otis recognizes that the Federal Court is not altogether deprived from considering constitutional issues, provided the question is “incidental” to federal law.

This opinion is difficult to follow. At the outset, excluding Federal Court power over damages where the *Charter* has been infringed only raises the question: if the Federal Courts have power over federal Crown liability, why not extend this to claims where *Charter* has been infringed? Nothing in the Federal Courts Act excludes such an extension. In any event, the *Charter* must be seen as implied in Federal Court jurisdiction since nothing in the Act explicitly lists it as a ground for review. Indeed, all of Otis’ arguments for not granting the Federal Court power of damage claims where the *Charter* has been infringed justify excluding Federal Court jurisdiction over the *Charter* altogether. Stating that s. 101 limits the Federal Court’s power to laws of Canada and that the *Charter* is not a “law of Canada” would therefore exclude the Court’s power under the *Charter* not only for damage claims but also for the assessment of federal government action.

In more recent cases, however, the jurisdiction of the Federal Court in relation to provincial superior courts appears to have expanded. These changes cannot be explained by amendments to the *Federal Court Act*, but rather by the recognition of the Federal Court as an integral part of the Canadian judicial system, as provided for by s. 101 of the *Constitution Act, 1867*. For instance, it has been held that the Federal Court has exclusive jurisdiction where the challenge is not based on the validity of the legislation.⁴⁷⁸ There is also authority to the effect that provincial jurisdiction does not extend to reviewing subordinate federal legislation on the basis that it is *ultra vires* its empowering statute.⁴⁷⁹ The Supreme Court has also said that provincial superior courts must defer to the Federal

⁴⁷⁸ *International Fund for Animal Welfare v. Canada* (1998), 157 D.L.R. (4th) 561 (Ont. Gen. Div.); *Mousseau v. Canada (A.G.)* (1994), 107 D.L.R. (4th) 727 (N.S.C.A.), appl’d in *Nolan v. Canada (A.G.)* (1998), 155 D.L.R. (4th) 728 (Ont. Div. Ct.).

⁴⁷⁹ *Saskatchewan Wheat Pool v. Canada (A.G.)* (1993), 107 D.L.R. (4th) 190 (Sask. C.A.).

Court.⁴⁸⁰ However, the essential question – the powers of the Federal Court under the Constitution, remains open to debate.

b) Limitation of Federal Court Power by Administrative Jurisdiction

Following *Northern Telecom*, the next logical step in the restriction of Federal Court power was taken in *Tétrault-Gadoury*.⁴⁸¹ In this case, LaForest J. stated that the Federal Court could only determine the challenge to an administrative authority's ruling and it did not have power to hear the constitutional claim. This case concerned an individual who challenged the constitutionality of an initial decision by the *Canada Employment and Immigration Commission*, which could be appealed before a board of referees, and thereafter by an umpire, who had jurisdiction over general questions of law. In addition, the *Federal Court Act* provided that individuals could thereafter apply to the Federal Court to have the final decision reviewed. However, s. 28 of the *Federal Court Act* was interpreted as limiting the Federal Court of Appeal, the initial review jurisdiction, "to overseeing and controlling the legality of decisions of administrative bodies and to referring matters back to those bodies for redetermination, with directions where appropriate."⁴⁸² As a result, the Federal Court did not have jurisdiction to decide the constitutional issue.

In support of restricting the powers of the Federal Court, La Forest J. referred approvingly to *Poirier v. Minister of Veterans Affairs*.⁴⁸³ This case concerned the powers of the Veteran's Appeal Board under the Constitution, which concluded that the Board did not have the power to set aside legislation that it believed unconstitutional. The opinion of Marceau J.A. stated that s. 28 of the *Federal Court Act* provided recourse "of very special nature". In response to the argument that the issue of the tribunal's jurisdiction with regard to the *Charter* was irrelevant in the Federal Court, Marceau J.A. stated "The Court cannot pronounce itself on a question which did not face the

⁴⁸⁰ *Reza*, *supra* note 458.

⁴⁸¹ *Tétrault-Gadoury*, *supra* note 91.

⁴⁸² *Ibid.* at 37.

⁴⁸³ [1989] 3 F.C. 233 (C.A.).

administrative authority, nor order the authority to answer one way or another which is not of its concern. The very nature of this recourse determines its limitations, and the procedural rules which govern it (an application which must be heard and determined “without delay and in a summary way” (subsection 28(5))”.⁴⁸⁴ The argument continued, stating that to consider the constitutional question in Federal Court would imply remitting it back to the administrative tribunal, which would prompt a never-ending circuit of litigation. In other words, in constitutional matters, the Federal Court had no more power than the administrative tribunal.

Pending the ruling in *Tétrault-Gadoury*, Federal Court power were amended. Federal Court power to decide constitutional questions was not recognised in the Federal Court Act until 1990.⁴⁸⁵ However, amendment only provided for notice of constitutional questions before the Federal Court but did not explicitly state that individuals could invoke constitutional grounds of review. Nevertheless, it had long been established that the Federal Courts are required to consider constitutional questions properly brought to their attention, and that they have the power to draw all the consequences pertaining to the unconstitutionality of “laws of Canada”.⁴⁸⁶ However, additional notice requirements in Federal Court would explain later fluctuations in the powers of the Federal Court. Thus, the restrictive interpretation of Federal Court powers was implicitly overruled in *Native Women’s Association of Canada v. Canada*, where the Supreme Court stated that the Federal Court has jurisdiction to deal with *Charter* challenges in reviewing a particular decision or orders.⁴⁸⁷ This case concerned the issuance of a declaratory judgement against the government for the violation of *Charter* rights and the court, speaking unanimously, was silent on the *Tétrault-Gadoury* precedent.

Nevertheless, even when the Federal Court has been recognised as having power over *Charter* issues, the effects of its rulings would resemble those of administrative tribunals: they are only binding between the parties to the dispute. This was established in

⁴⁸⁴ Per Marceau J.A., *ibid.* at 247.

⁴⁸⁵ R.S. 1990 c. 8, s. 19.

⁴⁸⁶ *Northern Telecom No. 2*, *supra* note 80.

⁴⁸⁷ *Native Women’s Association of Canada v. Canada*, [1994] 3 S.C.R. 627 [*Native Women*].

Schachter v. Canada, where the Supreme Court limited the effects of a ruling of the Federal Court to the parties to the dispute. On the one hand, the Supreme Court stated that the Federal Court had the power and duty to declare a statute unconstitutional, pursuant to s. 52(1) of the *Constitution Act, 1982*, in whole or in part where necessary.⁴⁸⁸ This also included the possibility of “reading-in” an otherwise unconstitutional statute. However, the Supreme Court stated that a ruling of the Federal Court would not extend to parties in similar or identical circumstances. The Court stated that s. 24(1) of the *Charter* does not confer on the Federal Court the power to issue a ruling with legal implications beyond the immediate parties to the dispute. In other words, it could not decide that natural parents, generally speaking, are entitled to benefits on the same terms as the parties to the dispute. Rather, and without any further explanation, “s. 24(1) provides an individual remedy for actions taken under a law which violate an individual’s *Charter* rights. Again, however, a limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the *Constitution Act, 1982*”.⁴⁸⁹

The restrictive interpretation of Federal Court powers was initially followed by some judges of the Federal Court, Trial Division, who ruled that the Federal Court did not have jurisdiction to decide constitutional issues because the former administrative authority did not have such power.⁴⁹⁰ This ruling is all the more surprising given references to constitutional issues in the then-*Federal Court Act*.⁴⁹¹ Nevertheless, the Federal Court of Appeal confirmed the wider interpretation of its powers by stating: “in order to determine whether a decision-maker acted within its jurisdiction, the constitutionality of the conferring provision must be assessed”.⁴⁹² The Federal Court justified this change in powers over constitutional issues in the amendments to the *Federal Court Act*.⁴⁹³ Moreover, later amendments to the now-*Federal Courts Act* confirm an effort to provide

⁴⁸⁸ *Schachter*, at 724-25.

⁴⁸⁹ *Ibid.* at 725.

⁴⁹⁰ *Gwala v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 43 (T.D.), aff’d, [1999] 3 F.C. 404 (C.A.) [*Gwala C.A.*]. See also *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198 (T.D.), application for leave to appeal refused, [2001] 1 S.C.R. viii.

⁴⁹¹ Ss. 18(3) and 57(1) of the *Federal Court Act*, *supra* note 368.

⁴⁹² *Gwala C.A.*, *ibid.* at 406-407.

⁴⁹³ *Ibid.*

the Federal Court with general jurisdiction in federal matters, but also the need for clarification on the limits thereof.⁴⁹⁴

While it does not belong to judges, and even less administrative tribunals, to define their own jurisdiction, it is difficult to reconcile the restrictive interpretation of Federal Court powers with the increased powers of administrative tribunals.⁴⁹⁵ Thus, the unabashed uncertainty regarding Federal Court power under the *Charter* raises the problem as to whether there can be any principled resolution of its jurisdiction. For one, powers of contempt have been implied in the jurisdiction of administrative tribunals,⁴⁹⁶ which makes it difficult to deny such power to the Federal Court. It would be possible to interpret Federal Court powers under the *Charter* as identical to those of administrative tribunals for the purposes of s. 24(1) of the *Charter*, as outlined in *Weber*, which recognised that a tribunal can provide a *Charter* remedy if it wields jurisdiction over parties, subject-matter and remedy.⁴⁹⁷ However, this is not a satisfactory answer because the Federal Court benefits from greater guarantees of independence than administrative tribunals.⁴⁹⁸ Moreover, in *Martin and Laseur*, the Supreme Court allowed administrative tribunals to widen their remedial jurisdiction, beyond the clear terms of their statutory powers by setting them aside by virtue of s. 52(1) of the *Constitution Act, 1982*.⁴⁹⁹

Although s. 101 of the *Constitution Act, 1867* only grants jurisdiction to the Federal Courts in matters regarding “laws of Canada”, it is difficult to accept the restrictive interpretation of its remedial powers in such matters. Thus, while it is generally emphasised that the Federal Courts are mere statutory courts and cannot define their own jurisdiction, the amalgamation between the notion of “inherent jurisdiction” and “general original jurisdiction” lead to the conclusion that while they benefit from guarantees of

⁴⁹⁴ S. 28(1) now reads: “The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals”. *Federal Courts Act* *supra* note 368, as am. S.C. 2002, c. 8, s. 14. The former version of s. 28 (1) restricted the Federal Court of Appeal to reviewing decisions “other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis”.

⁴⁹⁵ *Martin and Laseur*, *supra* note 98. See also Mullan, *Administrative Law*, *supra* note 10 at 362.

⁴⁹⁶ *Chrysler*, *supra* note 220.

⁴⁹⁷ See above B. ADMINISTRATIVE POWER UNDER S. 24(1) OF THE *CHARTER*.

⁴⁹⁸ *Supra* note 125.

⁴⁹⁹ *Martin and Laseur*, *supra* note 98.

independence identical to those of the Supreme Court of Canada and to those of provincial superior courts, the Federal Courts have lesser powers than administrative tribunals, which now have the power to set aside their own empowering statute and other legislation, with the caveat of not creating a binding legal precedent.⁵⁰⁰ Such a power is highly questionable when exercised by authorities lacking superior court independence, objections which do not apply to the Federal Courts.⁵⁰¹

Thus, the only workable solution for defining Federal Court power under the Constitution, in contradistinction to administrative tribunals and to provincial superior courts, consists in recognising its inherent powers, powers which nevertheless are not of general nature insofar as they do not and cannot validly extend to both provincial and federal jurisdiction, as confirmed by s. 101 of the *Constitution Act, 1867*. Thus, while the Federal Courts contradict the traditional unity of the Canadian judicial system, they are validly established superior courts under s. 101 of the *Constitution Act, 1867*. As such, they cannot be described as those of mere administrative tribunals, as far as their constitutional powers are concerned. Thus, while they are “statutory courts”, their essential distinguishing point is that they do not and cannot constitutionally wield over matters extending beyond “laws of Canada”. Federal Court powers under the Constitution can thus equally be described as flowing from the *Constitution Act, 1867*, just as provincial superior courts.

Conclusion

The United States and Canada have adopted the common position of distinguishing between constitutional and administrative review of government action. This dichotomisation of judicial powers is based on the idea that constitutional review and common law review operate on different foundations. This position is difficult to accept because judicial powers are directly responsible under the Constitution. Although

⁵⁰⁰ *Ibid.*

⁵⁰¹ See above: 1. Reading-in and Reading-down as Constitutional Remedies

illustrating the different sources of law to review government action, at least the historical sources, the distinction between constitutional and administrative review of government action has allowed administrative law to develop autonomous rationales for judicial intervention. The problem is not that there are different rationales for controlling administrative action; it is that such rationales can develop in complete isolation from fundamental rights.

Insofar as both federal and superior courts should be seen as drawing their powers from the Constitution and accordingly possessing “inherent jurisdiction”, only the former should be seen as wielding general jurisdiction. Since the judicial review of administrative action is grounded in the judicature provisions of the *Constitution Act, 1867*, and both Superior and Federal Courts draw their power therefrom, it is difficult to argue that such power is one ultimately pertaining to the common law and statute. On a wider level, this raises the question as to the scope of the constitutional foundations of judicial review of administrative action. In this respect, it is difficult to conclude that they are limited to the judicature provisions and do not include other parts of the Constitution, written or unwritten.

CHAPTER 6 – AUTONOMY OF THE *CHARTER* AS CAUSE OF ACTION

The term “*Charter* case”, as distinguished from an “administrative law case” is often used to describe the *Charter* as providing an autonomous “cause of action” of action against government.⁵⁰²

However, the notion of “cause of action”, although common in legal vocabulary, has never received any clear definition. The clearest evokes two notions: (1) a fact or group of operative facts giving rise to one or more bases for judicial action; (2) a legal theory of a lawsuit.⁵⁰³ These two definitions have the common point of demonstrating the practical function of “cause of action”: to limit a single suit from being split and made into several separate lawsuits. Indeed, this reflects the doctrine of *res judicata* which provides conclusiveness not only with regard to matters that were actually pleaded and express findings, but in addition, “any point, whether of assumption or admission, which was in substance of the ratio of, and fundamental to the decision.”⁵⁰⁴ Thus, it is said that the judiciary will not allow “the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward...”⁵⁰⁵

For instance, reflecting the factual notion of “cause of action”, it will be said that an individual does or does not have sufficient “cause of action” to launch proceedings. This means that the facts presented by the individual demonstrate so little chance of success that the proceedings should not go ahead, or conversely that proceedings have gone ahead and that the individual has not succeeded because of insufficient “cause of action”.

⁵⁰² However, some authors have noted the difficulty of identifying what a “*Charter* case” actually is, and this for mere statistical purposes. See *Morton, Russel, Whitney*, *supra* note 3 at 3.

⁵⁰³ D. M. Walker, *The Oxford Companion to Law* (New York: Oxford University Press, 1980).

⁵⁰⁴ Per *Rubinstein*, *supra* note 248 at 27.

⁵⁰⁵ Per Wigram V.C. in *Henderson v. Henderson* (1843), 3 Hare 100, at 114-15; see also *Re Hilton, Ex p. March* (1892), 67 L.T. 594; *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155 (P.C.).

Viewed as a legal theory, a cause of action encapsulates not only the basis of the lawsuit but the corresponding remedy. Thus, it will be said that an individual has launched a “*Charter* case” against government, i.e. a “*Charter* cause of action” and has been granted, or not, a “*Charter* remedy”.

However, it is difficult to view administrative law and the *Charter* as different theoretical “causes of action” against the government. As the Ontario Court of Appeal stated in *McKinney v. Board of Governors of University of Guelph*.⁵⁰⁶

We have always had civil liberties in Canada which have been protected by the common law, legislation, and Parliamentary tradition. They did not start with the *Charter* or even with the statutes passed from time to time by Parliament and the legislatures. What the *Charter* did was to recognize existing rights and freedoms, fulfill the gestation of others, and create new ones. It acts as a guarantee of these rights and freedoms and is a direction to government at the federal and provincial levels that no action of theirs is to be in conflict with its standards in the human and civil rights field.⁵⁰⁷

This observation can be taken further. Indeed, it is difficult to fit cause of action as “legal theory of a lawsuit”, which developed before the advent of the administrative state, into contemporary public law. In its traditional meaning, cause of action refers to specific individual behaviour that should or should not have taken place (i.e. criminal or civil). However, relationships between individuals and administrative authorities are characterized by discretionary powers and a more complex web of statutory and non-statutory obligations. It is therefore difficult, and not very useful to identify different causes of action with each specific statutory obligation or non-statutory obligation, which in any case do not seek to prohibit behaviour but guide it. Having recognized this, administrative lawyers developed the general principle of legality, which under one heading, enveloped all different possible causes of action sought to classify them “grounds of review” because they were rarely invoked separately but could also evolve in the course of a dispute and thus need not imply correspondence to a specific predetermined remedy.

⁵⁰⁶ 46 D.L.R. (4th) 193[*McKinney CA*], aff’d: *McKinney supra* note 120.

⁵⁰⁷ *McKinney CA, supra* note 506 at 208-209.

Nevertheless, public lawyers tend to use the phrase “cause of action” as legal theory of lawsuit and “grounds for review” indiscriminately, thus describing “grounds of review” as autonomous causes of action. This is particularly the case in Canadian public law. The distinction between the *Charter* as “ground of review” and “cause of action” is important because the analysis of the *Charter* as cause of action has generally implied a specific legal regime for *Charter* claims: special procedure and autonomous scope of application. In this respect, the limits of judicial power reflect the idea that individuals have not exercised the proper “cause of action”, in its theoretical sense, as opposed to demonstrating sufficient “cause of action” in the factual sense. This is questionable because the limits of review should be determined by the facts of each case, rather than in the method according to which review has been argued, which in any case can evolve. This make a distinction between “constitutional” and “common law review” of government action as autonomous causes of action, and more generally, the distinction between the *Charter* and administrative law as autonomous bodies of law difficult to accept.

A. NATURE OF THE *CHARTER* AS GROUND OF REVIEW AND “LEGAL THEORY” OF LAWSUIT

The expression “*Charter* application” is generally distinguished from “application for judicial review”, although the Supreme Court has made it clear that the former are to be “fitted into the existing scheme of Canadian legal procedure”.⁵⁰⁸ Thus, in spite of the common use of the expression “*Charter* application”, there is no exclusive form of action for obtaining redress under the *Charter*. Moreover, in spite of academic fervour regarding

⁵⁰⁸ *Mills*, *supra* note 35 at 953. K. Roach has criticized the principle of fitting the *Charter* into existing procedure as an expression of “procedural conservatism”, thus referring to the problem that fitting the *Charter* into the existing scheme of procedure could conflict with the principle that there must always be a “court of competent jurisdiction” to hear *Charter* claims. See Roach, *Remedies* at 6.70. However, this is implausible since superior courts wield general original jurisdiction.

“*Charter* damage claims” against government,⁵⁰⁹ the Supreme Court excluded damages under s. 24(1) of the *Charter* in *Guimond v. Quebec (A.G.)*, which makes it unclear as to what extent the *Charter* can be interpreted as a distinct body of law applicable to government action.⁵¹⁰ As a result, some argue that the relation between tort law and the Constitution is “evolutive”.⁵¹¹

These solutions confirm the general trend in public law in the common law world: to define rights not by entitlement to a specific remedy but to allow individuals to proceed on the assumption that each case is different and merits to be judged on its own terms; in short, not to let the tail wag the dog. This transition from a theoretical definition of cause of action to a factual definition is reflected in the evolution of standing, but also in the evolutionary nature of judicial disputes. Nevertheless, as evidenced by notice requirements, and in spite of its open-textured nature, the introduction of the *Charter* appears to counter this trend since it is treated as an autonomous cause of action against government.

1. Evolution of “Cause of Action” in Public Law

At the outset, the theoretical notion of cause of action still appears to be prevalent in Canada and is reflected in the classification of standing according to remedy and ground invoked.⁵¹² Distinguishing between constitutional and administrative laws of standing reflects the argument that standing for constitutional grounds should be different because a pronouncement on constitutional issues implies an assertion of “ultimate rightness”.⁵¹³ Moreover, the remedial classification distinguishes between “standing to those directly affected” and “public interest standing”, which in the first case is said to be “as of right” and not limited to any particular remedy, whereas in the second, it is discretionary and

⁵⁰⁹ K.D. Cooper-Stephenson, *Charter Damages Claims* (Toronto: Carswell, 1990).

⁵¹⁰ [1996] 3 S.C.R. 347.

⁵¹¹ L. Lebel, “La protection des droits fondamentaux et la responsabilité civile” (2004) 49 McGill L.J. 231.

⁵¹² See Hogg, *Constitutional Law* *supra* note 9 at 56.2(a), stating that standing varies according to remedy and the area of law involved.

⁵¹³ J. Vining, *Legal Identity* (New Haven, Conn.: Yale University Press, 1978) at 9.

limited to declaratory relief. The distinction is also reflected for standing under the *Charter*, which is traditionally divided between declaratory relief under s. 52(1) – public interest standing, and additional remedies under s. 24(1) – standing for those directly affected.

Distinguishing between the *Charter* and administrative law as autonomous theoretical causes of action can be contrasted with a general trend in public law, which seeks to identify “cause of action” in the factual sense, as opposed to defining a plurality of discreet “causes of action” for which the plaintiff may or may not qualify. Arguments in favour of a fact-based approach to cause of action are reflected in the ongoing debate regarding the nature of standing, as seeking “who” can initiate proceedings, or rather “what” issues are proper for judicial determination and the development of public interest standing.

a) Traditional Notion of Cause of Action as Legal Theory of Lawsuit

Etymologically, standing or *locus standi*, refers to a “place to stand”, although the doctrine of standing traditionally seeks to determine “who” can institute judicial proceedings. The idea that standing determines “who”, as opposed to “what”, implies that standing does not concern itself with the merits of the lawsuit.⁵¹⁴ Each approach to standing represents a different characterisation of judicial review, either subjectively in the Diceyan tradition, as a private dispute or conversely as an objective application of the law. Thus the subjective interpretation of judicial review will identify standing with the violation of a certain right, whereas in the second, standing will limit itself to identifying a legally cognizable interest. Thus, by avoiding the question of what issues courts should adjudicate, the doctrine of standing is said to transcend both public and private law.

⁵¹⁴ For the objective view, see G.A. Spann, “Expository Justice” (1985) 131 U. Pa. L. Rev. 585. For a subjective view, see P.L. Strauss, *Administrative Justice in the United States*, 2nd ed. (Durham, N. C.: Carolina Academic Press, 2002) at 314; Hogg, *Constitutional Law supra* note 9 at 56.2.. For intermediary view, see Tribe, “Constitutional Law, 2000” at 391-92 arguing that the U.S. law of standing focuses more on the issues of the dispute, and considers more issues of discretion flowing from legislative grants of jurisdiction and common law traditions.

However, it cannot be argued that standing is only exclusively concerned with “who” can institute proceedings while maintaining different laws of standing that vary according to the grounds invoked. Moreover, it is difficult to define public law standing as narrowly as private law standing, because the substantive principles of public law are different from those of private law and therefore give rise to different considerations (e.g. privity of contract). Indeed, the problem of “who” can institute proceedings is of secondary importance in public law: individual rights against government are defined by abstract principles, as opposed to specific entitlements.⁵¹⁵

Indeed, judicial review can be sought on multiple grounds and these can evolve in the course of a dispute. Moreover, new grounds can be invoked on appeal if they refer to facts presented in the initial record.⁵¹⁶ This makes it difficult to assess standing by reference to the specific ground upon which it is being litigated, irrespective of their validity, as opposed to the facts upon which it is based. Nevertheless, standing has traditionally been associated with the specific grounds invoked, which has implied treating grounds of review as independent “causes of action”.⁵¹⁷ In Canada, standing for constitutional grounds is presumably wider than for administrative law grounds. Nevertheless, there is much less consensus in the U.S. constitution, regarding the “case and controversy” requirement.⁵¹⁸ For some, this has implied that standing requirements cannot be widened. In contrast, Sunstein argues that Congress can create causes of action that go beyond the constitutional standard of “case and controversy” such that administrative law claims need not demonstrate personal injury but may sufficiently limit themselves to

⁵¹⁵ H.S. Fairley, “Private Law Remedial Principles and the *Charter*: Can the Old Dog Wag this New Tail?” in J. Berryman, ed., *Remedies: Issues and Perspectives* (Scarborough, Ont.: Carswell, 1991) 313.

⁵¹⁶ *Bell ExpressVu*, *supra* note 708.

⁵¹⁷ In the U.S., these would include § 703 of the *Administrative Procedures Act* *Administrative Procedures Act*, 5 U.S.C., Chapter 5, § 511-599 (APA): “The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute ...”. Thus, when the agency’s statute provides that its action is reviewable in court, then the “cause of action” is statutorily provided, and resort to common writs is unnecessary. Similarly, common law writs provide a cause of action in the absence of any such statutory provision where the conditions for such cause of action are met and where no cause of action, then equitable relief will be granted. In addition, where no such remedies are not available in, § 704 of the APA establishes its own cause of action: “Agency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review”. Finally, as *Marbury v. Madison* demonstrates, such claims can evolve into constitutional disputes.

⁵¹⁸ U.S. Const. art. III, § 2.

demonstrating the existence of a legal interest.⁵¹⁹ However, both sides of the debate agree that public law is fractioned into a variety of “causes of action” as opposed to “grounds of review” because standing will vary according to arguments made by the parties.

Moreover, the remedial distinction between standing for those directly affected, which is “as of right”, and public interest standing which would be “discretionary” is difficult to accept. In *Baker*, the Supreme Court recognized that a stark distinction between discretionary and non discretionary powers is not possible,⁵²⁰ such that all powers involve a varying degree of discretion, that is, the ability to choose between two or more options. Accordingly, some have contested the distinction, such that it portrays courts as being at the mercy of a plaintiff who has suffered a wrong. Accordingly they point out that standing to those directly affected is not purely “as of right” since it will involve the consideration of other factors, such as exhaustion, the availability of other remedies. These authors argue that the grant of jurisdiction is not an inexorable command but must take into account other considerations; thus the issuance of prerogative writs is not mandatory but discretionary.⁵²¹

Indeed, it is one thing to say that the law imposes different standing conditions for each specific remedy, and another to say that standing conditions tend to follow general trends. In any event, the remedial classification is precarious because prerogative orders often overlap with one another: e.g., prohibition and injunction or *quo warranto* and *certiorari*. Some authors therefore argue that claimants plead facts and therefore need not specify what remedy they require, and may leave its determination to the court.⁵²² Moreover, Chayes argues that remedies are fashioned on an *ad hoc* basis,⁵²³ which would imply that the remedial classification of standing is actually a simplification of the law. Other authors point out that regardless of the category of plaintiff, there is always a

⁵¹⁹ C. Sunstein, “Standing and the Privatization of Public Law” 88 (1988) Colum. L.R. 1432.

⁵²⁰ *Baker*, *supra* note 169.

⁵²¹ D.L. Shapiro, “Jurisdiction and Discretion” (1985) 60 N.Y.U.L. Rev. 543.

⁵²² P. Cane, “The Constitutional Basis of Judicial Remedies at Public Law” in *Administrative Law Facing the Future*, P. Leyland & T. Woods, eds. (London: Blackstone Press, 1997) at 245. For Canada, see also *Native Women*, *supra* note 487 at 647-48, holding that the fact that a remedy was not specifically claimed does not prohibit the court from granting it.

⁵²³ A. Chayes “The Role of the Judge in Public Law Litigation” (1976) 89 Harv. L. Rev. 1281 at 1302.

constitutional basis for the granting and selection of remedies at public law because each remedy represents different levels of judicial intrusiveness.⁵²⁴ As Sossin states, like justiciability, standing is “concerned with the appropriate boundaries of judicial intervention.”⁵²⁵ Accordingly, “the question of *locus standi* goes to the jurisdiction of the court”⁵²⁶ or even that “parties are not entitled to confer jurisdiction, which the court does not have, on the court by consent ...”.⁵²⁷

b) Towards a Fact-Base Definition of Cause of Action

One of the greatest advances of public law, in contradistinction to private law, has been the expansion of standing to ensure government operate within the limits of the law, as opposed to the mere retribution of personal prejudice. Thus, by widening the law of standing to the general public, the initial question of “who” can initiate proceedings has lost its importance.

Public interest standing was first established by the Supreme Court for constitutional claims, and in a second step, recognised that the same considerations would determine public interest standing at administrative law. Thus, administrative and constitutional law public interest standing can be described as based on the same considerations, although they protect different rights. The general law of standing under s. 52(1) of the *Constitution Act, 1982* – public interest standing – does not require a “Hohfeldian” plaintiff, that is, one that demonstrates the violation of a personal right, privilege, immunity or power. The requirement of “exceptional prejudice” was dropped in *Thorson v. Canada*, where Laskin C. J. ruled that the plaintiff had standing to apply for a

⁵²⁴ Cane, *supra* note 522 at 243.

⁵²⁵ L.M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough: Carswell, 1999) at 6.

⁵²⁶ *R. v. Secretary of State for Social Services*, [1990] 2 QB 540 at 556 (Woolf LJ) [*Social Services*]. See also A. Scalia, “The Doctrine of Standing as an Essential Element of the Separation of Powers” (1983) 17 *Suffolk U. L. Rev.* 881; Sunstein, *supra* note 519.

⁵²⁷ *Social Services*, *supra* note 526.

declaration to the effect that the *Official Languages Act* is unconstitutional, not out of interest in its financial consequences of the *Official Languages Act* for him as a taxpayer, but rather that all citizens share an interest that Parliament behave in a constitutional manner.⁵²⁸ Indeed, the plaintiff in this case did not suffer any exceptional prejudice and it would foreseeably been immunised from review had standing not been granted. Canada, Laskin C.J. argued, was not a unitary state as the United Kingdom, but one where the supreme authority is not in Parliament but in the Constitution.⁵²⁹ Hogg states: “When a private person challenges a law on federalism grounds, no matter how selfish the motive of the challenger, the private person is enforcing a regime of constitutionalism that requires governments to obey the Constitution.”⁵³⁰

Second, in *Finlay v. Canada (Minister of Finance)*, the Supreme Court ruled that constitutional rationales of standing also applied where administrative law grounds are invoked.⁵³¹ This case concerned a welfare recipient who, having failed in an action against the Manitoba government, argued that federal payments to that province were not authorized under the said plan. Because this was not a constitutional argument but one of administrative law, the plaintiff would have had to demonstrate that his rights were directly affected by the federal government’s decision, which would not have been possible as a mere welfare recipient. Once again, this widening of standing was based on the concern that not doing so would immunize the exercise of statutory power from judicial review. As a result, the law of standing now requires (1) that the case raises a serious legal issue; (2) that there is no other reasonable or effective way to bring the issue before the court; and (3) that the citizen has some genuine interest in bringing the proceeding. The limits to this expansion are also based on constitutional concerns: (1) “the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody”; (2) “the concern that the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by

⁵²⁸ Thorson, *supra* note 374.

⁵²⁹ Laskin at 150. See also *Nova Scotia (Board of Censors) v. McNeil*, [1978] 2 S.C.R. 662.

⁵³⁰ Hogg, *Constitutional Law supra* note 9 at 56.2(e).

⁵³¹ [1986] 2 S.C.R. 607.

them”; and (3) “the concern about the proper role of courts and their constitutional relationship to other branches of government.”⁵³²

The consecration of public interest standing can reflect the establishment of a new cause of action to ensure that all individuals have an interest in ensuring that government operates within the limits of the law, but also a change in the notion of “cause of action” itself as fact based, as opposed to representing a specific legal theory underlying a lawsuit. Thus, following the establishment of public interest standing for both constitutional and administrative law and without denying the possibility of remedial restraint, the question arises as to whether these cases established one general test to replace all others, or one exceptional test that would operate in parallel to the existing law of standing.

At the academic level, some argue that the various laws of standing could now be classified under the general heading of “sufficient interest”.⁵³³ Authors such as Wade, Forsyth, and Ross argue that there is only one general test for standing, as opposed to various tests strictly set out for each remedy.⁵³⁴ On the other, others have criticised this analysis of standing as vague and imprecise.⁵³⁵ P.P. Craig describes this approach as a “fusion of standing and merits” and states: “the conclusion is both the ultimate generalization and the ultimate *ad hoc*: the court will allow a person to be a beneficiary of a statute if it thinks it right that this should be so.”⁵³⁶ While it is overstated to argue that the “sufficient interest” test will cause the disappearance of standing altogether, the remedial classification is difficult to sustain, if only by recognizing that some Canadian provinces have unified application procedure, thus enabling plaintiffs to re-adjust claims in the course of disputes.⁵³⁷ In this respect, the remedial distinction can only be useful as representing a general classification based on constitutional considerations varying

⁵³² *Ibid.* at 631, per Le Dain J.

⁵³³ S.M. Thio, *Locus Standi and Judicial Review* (Singapore: Singapore University Press, 1971).

⁵³⁴ J.M. Ross, “Standing in *Charter* Declaratory Actions” (1995) 33 Osgoode Hall L.J. 151-201 [Ross, “Standing”]. See Wade & Forsyth, *supra* note 14 at 667-68.

⁵³⁵ T.M. Cromwell, *Locus Standi – A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986).

⁵³⁶ P.P. Craig, *Administrative Law*, 5th ed. (London: Sweet & Maxwell, 2003) at 743.

⁵³⁷ See Mullan, *Administrative Law*, *supra* note 10 at 433.

according to the intrusiveness of judicial intervention, as opposed to a rigid categorization of availability of relief for varying “causes of action”.

These positions were adopted in other common law countries. In *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses*,⁵³⁸ the House of Lords stated that sufficiency of interest should be seen against the subject matter of the application for judicial review. This is also the approach followed in Australia. In *Kioa v. West*, Brennan J. stated that a person with a “distinctive affection” would necessarily qualify for “special interest” in the matter of certiorari.⁵³⁹ Thus, Aronson and Dyer conclude that “special interest” will become the universal test of standing:

“we cannot see the long-term gain in maintain or developing separate tests, whether at common law or under the statutory “person aggrieved” formulas. These so-called tests dictate no outcome by themselves. They are all dependent on the particular regulatory context. We can understand the urge by those impatient with the restrictions of *any* standing requirement to say that this or that remedy has a different and more liberal test. But that is a purely temporary and strategic argument, which remains unconvincing at the level of principle unless the difference can be demonstrated. It is unwise to develop different answers to the same problem.”⁵⁴⁰

c) Evolutionary Nature of Judicial Disputes: Relation between Judicial Power and Party Submissions

Another reason for not accepting the view that the *Charter* as a distinct “legal theory of lawsuit” is the fact that judges are responsible under the Constitution, and therefore will

⁵³⁸ (1981), [1982] A.C. 617 (H.L.).

⁵³⁹ (1985) 159 CLR 550 at 621.

⁵⁴⁰ M. Aronson & B. Dyer, *Judicial Review of Administrative Action* (Sydney: L.B.C. Information Services, 1996) at 707.

ask parties to raise constitutional arguments if necessary. In this respect, judicial notice of the Constitution and the principle “the judge knows the law” does not conflict with the general principle of adversarialism, which allows parties to remain in control of proceedings. Indeed, it is unlikely that judges will only address administrative law arguments, and should they be unsuccessful, allow parties to commence entirely new proceedings using *Charter* arguments. In this respect, while it has generally been assumed that an unsuccessful application for judicial review under traditional administrative law arguments would imply no judgement as to the constitutionality of administrative decision, the general nature of judicial review implies that unsuccessful application are generally supposed to imply that the applicant is unsuccessful altogether.

Nevertheless, has the *Charter* transformed the role of the judge in public law litigation such that claims made by the parties no longer constitute a limit on judicial power to review administrative action, whose powers are now based on higher order law? As adversarial institutions, Canadian courts focus on the protection of individual rights, full fact-trying, while nevertheless suffer from a natural propensity of polarizing legal claims and aggravating conflicts by pulling them to their extremes. This process, sometimes called the “narrowing” or “transformation” of disputes, occurs at various stages in lawyer-client interactions, but also throughout the process of litigation.⁵⁴¹ Indeed, this narrowing of the focus of disputes with complicated contextual features can often lead to missing what is really at issue. This problem is heightened if judicial review is seen as fractioned into various causes of action as opposed to verifying the overall validity of a particular decision.

In this respect, Strayer argues that a court reviewing administrative action should look at the “whole law” as it exists, and not only as the parties have presented.⁵⁴² This position is reflected in the argument that judges have a different role in public law litigation that

⁵⁴¹ C. Menkel-Meadow, “The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us” [1985] *Modern Journal of Dispute Resolution* 25 at 31. See also W.F. Felstiner, R.L. Abel & A. Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming” (1980-81) 15 *L. & Soc’y Rev.* 631.

⁵⁴² Strayer, “Canadian Constitution”, *supra* note 2 at 41. *Contra*, Sossin, *supra* note 525 at 81, stating that courts should not entertain *Charter* arguments if the parties have raised administrative law arguments alone.

cannot be explained on the traditional adversarial model.⁵⁴³ In this respect, the scope of the dispute would no longer be determined by the parties since judges have a wider task of investigation. This was the case in *Godbout v. Longueuil (City of)*,⁵⁴⁴ where a municipal employee violated a city resolution requiring all new permanent employees to reside within its boundaries, in spite of having signed a declaration to such effect, and was accordingly terminated without notice. The Superior Court dismissed her action for damages and reinstatement, holding that the city's residence requirement did not contravene the Quebec *Charter* and that the Canadian *Charter* did not apply in this case. The Court of Appeal allowed the respondent's appeal, concluding that the residence requirement was invalid mainly because it was contrary to public order, under the Civil Code of Québec regarding adhesion contracts and abusive clauses. This argument was not made by the parties, but Baudouin J.A. stated that he could raise the issue *proprio motu*.⁵⁴⁵ The Supreme Court did not question such power but decided under the Quebec and Canadian *Charters*.

This position is linked to the notion of *ordre public* and the role of the judge in civil law jurisdictions, although courts have always had regard to their own jurisdiction – whether subject matter, territorial or otherwise.⁵⁴⁶ Although it is often said that the common law does not provide for such *ordre public*, individuals may not contract out of statutes designed to protect the public interest,⁵⁴⁷ just as such a statute's effects may not be halted by estoppel.⁵⁴⁸ On the other hand, Canadian courts are limited to considering legal issues related to the facts of the case, as presented at trial. These principles equally apply to constitutional argument.⁵⁴⁹ This will imply that judges and parties not raise any new arguments on appeal if they cannot be related to the facts as presented at trial. It is therefore possible to say that parties have wide latitude in formulating their arguments on

⁵⁴³ Chayes, *supra* note 523.

⁵⁴⁴ [1997] 3 S.C.R. 844.

⁵⁴⁵ [1995] R.J.Q. 2561 at 2566.

⁵⁴⁶ See e.g. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, granting leave to appeal a publication ban *ex proprio motu*, *ex post facto* because the procedure for doing so by third parties was unknown.

⁵⁴⁷ *British Columbia Telephone Company v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739.

⁵⁴⁸ *Hill v. Nova Scotia (A.G.)*, [1997] 1 S.C.R. 69.

⁵⁴⁹ See e.g. *Bell ExpressVu*, *supra* note 708.

appeal, although they cannot rely on an entirely new argument that would require additional evidence to be adduced at trial.⁵⁵⁰

Strayer argues that the supremacy of the Constitution should not allow parties to determine which parts of the issue they wish to present at trial, to the detriment of implied judicial powers of review and explicit duty to give effect to the Constitution.⁵⁵¹ As a limit to such power, he advocates a distinction between public and private interests,⁵⁵² a similar rationale provided by the civil law concept of “public order”, which allows for judges to raise arguments *proprio motu* if the public interest so requires. However, Strayer argues that where an individual makes a free and informed decision to forego arguments, that such decisions should be given effect.⁵⁵³ With respect to the *Charter*, the waiver of such rights generally would refer to “legal rights” contained in s. 7 such as the right to be secure against unreasonable searches or seizures, the right to be tried within a reasonable time, and the right to be tried by a jury. These would therefore be set aside since they do not purport to protect any particular public interest. Conversely, individual rights would be intangible and therefore invocable *proprio motu* where a public interest is at stake, such as the case for the right to a fair and public hearing by an independent and impartial tribunal, the right not to be subject to fair and unusual punishment and equality rights a freedom from discrimination on prohibited grounds.

In contrast, L.L. Fuller questioned whether an adjudicator may rest his decision on grounds not argued by the parties while acknowledging that perfect congruence between the arguments of the parties and those of the judge is unattainable. Fuller stated that perfect congruence must be an objective, if not a result, because otherwise the adjudicative process would be a “sham”. In areas of unfamiliarity with or novelty of the law, the risk of incongruence is therefore greater.⁵⁵⁴ Thus, given its novelty but also the “open texture” of *Charter* principles, incongruence between the arguments of the parties and those of the judiciary is therefore very likely in situations where the *Charter* has been

⁵⁵⁰ *R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.) at 64, leave to appeal to S.C.C. refused, [2002] 1 S.C.R. vii.

⁵⁵¹ Strayer, “Canadian Constitution”, *supra* note 2 at 239.

⁵⁵² *Ibid* at 236-37.

⁵⁵³ *Ibid.* at 236. See also Gibson, *General Principles*, *supra* note 8 at 163.

⁵⁵⁴ Fuller, *supra* note 222.

invoked or at least is relevant. Nevertheless, this is mitigated by two factors. First, *Charter* rights are not interpreted in “legal vacuums” but in the specific legal context in which a dispute takes place. Second, having due regard for procedural concerns, and the eventuality of a waiver, the problem of straying beyond the submissions of the parties is theoretical because courts can always ask the parties to produce argument on a certain issue, and it would not be in its interest to argue such issues on its own.

Moreover, this principle has been recognized as important in constitutional matters even more so because rules of procedure in every Canadian jurisdiction require the notification of the appropriate attorney(s) general before the court can deal with the constitutional question. On a practical level, when a court considers a constitutional issue to be relevant, it will call upon the parties to reformulate their arguments and adjourn the case accordingly.⁵⁵⁵ In this respect, while it would be unfair for an applicant whose rights had been violated to be barred from applying for a judicial remedy after an unsuccessful application under traditional administrative law arguments, the dynamic nature of disputes, and the ability of judges to ask parties to raise new arguments has the effect of mitigating this by ensuring that unsuccessful applications should imply, that all possible arguments have been raised.

2. Procedural Autonomy: Notification of the Attorney General

In contrast to the general evolution of the notion of “cause of action”, the *Charter* is procedurally subject to specific procedural requirements when it is raised before a court. Notice requirements reflect the autonomy of the *Charter* and administrative law as causes of action because a party raising a constitutional argument must notify the Attorney General, whereas a party arguing that an administrative decision or regulation is invalid because “*ultra vires*”, will generally not have to follow the same procedure.

⁵⁵⁵ See *Mossop*, *infra* note 783.

Whereas notification of the Attorney General has generally conflicted with inherent judicial powers of review and thus appearing subversive to judicial independence,⁵⁵⁶ it is established that the constitutionality of a statute is a universally recognised exception to the policy against governmental intervention because it enhances the quality of debate.⁵⁵⁷ Moreover, since the introduction of the *Charter*, all jurisdictions in Canada have adopted similar provision requiring the notification of the appropriate Attorney General(s), either provincial, federal or both, that a constitutional question has been raised. This increased role has even prompted some to advocate the establishment of an independent representative, autonomous from the Minister of Justice in order to deal with the growing role of the Attorney General.⁵⁵⁸ However, without denying the utility of notice requirements as a means of defending the validity of primary legislation, important questions arise as to their actual functions, particularly because the *Charter* is treated as an autonomous cause against administrative decisions and other forms of delegated legislation, which form an important part of *Charter* litigation. Thus, existing notice requirements must be put in perspective before their underlying rationales can be examined.

a) Evolution of Notice Requirements

In Canada, the party raising a constitutional argument must notify the appropriate Attorney General(s) traditionally purporting to ensure the representation of collective interests and “electoral will”. In cases concerning the validity of secondary legislation, the rationale has traditionally been the protection of provincial or federal jurisdiction. The origins of the notification requirement are found in cases involving the validity of primary legislation. In both *Winthrop v. Lechmere* of 1727 in the U.S.,⁵⁵⁹ and *Russel v. City of Fredericton* in Canada,⁵⁶⁰ the lack of representation of collective interests was

⁵⁵⁶ Strayer, “Canadian Constitution”, *supra* note 2; Hogg, *Constitutional Law*, *supra* note 9.

⁵⁵⁷ Hogg, *Constitutional Law*, *ibid.* at 56.6(a); Strayer, *ibid.* at 73-76.

⁵⁵⁸ J. Ll. J. Edwards, “The Attorney General and the *Charter* of Rights” in R.J. Sharpe ed. *Charter Litigation* (Toronto: Butterworths, 1987) at 45.

⁵⁵⁹ (1727), 3 *Acts of the Privy Council (Colonial Services)* 1910, at 139-50.

⁵⁶⁰ (1882), 46 L.T. 889 (P.C.).

held as determinant for the outcome of each. This triggered the concern that when the validity of primary legislation is under attack, it should benefit from proper argument from both sides of the dispute and therefore the party contesting the validity of the statute should notify the relevant Attorney General.⁵⁶¹ The first statutes requiring notification were passed in Quebec in 1882 and the following year in Ontario.⁵⁶²

Since Confederation, notification has increased in importance with the correlative decline of the Attorney General as sole defender of the public interest. In the past, the Attorney General exercised prior control over the engagement of relator proceedings. While the discretionary powers of the Attorney General, which may have appeared unreviewable in the past, are not protected by any “political questions doctrine”, the decision to authorise relator proceedings is not immune from review.⁵⁶³ However, because of the expansion of public interest standing, a court may allow an individual to proceed without authorisation from the Attorney General to exercise relator proceedings. Moreover, even in situations where standing has been granted to a private individual and the Attorney General could have been notified, notification is not necessary because the issue need not necessarily be litigated as a constitutional matter.

However, the duty to notify the Attorney General is also of particular relevance where individuals have entered into a relationship with administrative officials and are applying for judicial review. In “pure” constitutional litigation, where government has not established a relationship with individuals, and where the constitutionality of a statute is the only issue at hand, the Crown or the Attorney General are already a party to the proceedings. This is equally the case in criminal law proceedings. There is also the possibility of private intervention in most jurisdictions for the defence of public interests. However, in contrast to the notification for constitutional issues, it is not mandatory and is of greater relevance where primary legislation is under attack, because the outcome of such a question will affect a much wider portion of the population. Moreover, the increased role of the attorney general has in some cases even supplanted the power of the

⁵⁶¹ Strayer, “Canadian Constitution”, *supra* note 2 at 73-74.

⁵⁶² *Ibid.* at 73-86.

⁵⁶³ *Operation Dismantle*, *supra* note 764.

administrative tribunal to intervene. For example, in s. 23(1) of New Brunswick's *Judicature Act*, provides that administrative tribunals, regardless of their relation to ministerial authority, may not intervene in constitutional issues before courts without consent of attorney general.⁵⁶⁴

In the context of federalism, it became clear that each jurisdiction has a stake determining the validity of delegated legislation, particularly since the Canadian constitution provides an exhaustive distribution of powers. However, some provinces require notice where the delegated legislation was under attack on common law grounds. Thus, there has never been any clear policy on the matter. For example, in Saskatchewan, notice is required to the province's Attorney General where delegated legislation is under attack on non-constitutional grounds. On the other hand, until relatively recently, notice before the Supreme Court was only required for the constitutionality of a statute of Parliament or that of a legislature.⁵⁶⁵ Presently all jurisdictions require notification for a variety of secondary and tertiary legislation, ranging from regulations and by-laws, orders, resolutions, and in the case of British Columbia, any enactment within the meaning of the *Interpretation Act* (Canada).⁵⁶⁶ This is also the case of the Supreme Court of Canada,

⁵⁶⁴ R.S.N.B. 1973, c. J-2. However, other jurisdictions have not taken as clear a position, and the question therefore falls within the general law of intervention. Such cases demonstrate the utility in allowing for party intervention by administrative tribunals, even those under ministerial authority. For instances, in *Paul*, *supra* note 98 the Supreme Court granted party intervenor status to the Forest Appeals Commission while the Ministry of Forests and the Attorney General of British Columbia were already parties to the dispute. This possibility of intervening as party was granted in lieu of leave to appeal: S.C.C. Bulletin, 2002 at 923. This is probably due to the exclusively constitutional nature of the of the dispute, although the Commission was nevertheless granted party intervenor status and was the only party to the dispute recognised by the Supreme Court as fully successful.

⁵⁶⁵ *Rules of the Supreme Court of Canada*, S.O.R./2002-156 [*Rules of the Supreme Court of Canada*]; E.R. Cameron, *The Rules of the Supreme Court of Canada: promulgated June 19th, 1907, with notes, forms and precedents* (Toronto: A. Poole, 1907), Rules 18 and 19; see also *McKay* *supra* note 301 regarding delegated legislation, stating that notice is not required before the Supreme Court where the validity of primary legislation is not under attack. Notice requirements before the Supreme Court followed this general principle from the original promulgation of the *Rules of the Supreme Court* in 1905 until their amendment in 1976, when notice was extended for the constitutional validity and "applicability" of both primary legislation and regulations or the "operability" of federal statutes and regulations under the *Bill of Rights*. See *Rules of the Supreme Court*, as amended, April 1976, S.I.: s.n, 1976.

⁵⁶⁶ Alberta, "Judicature Act", s. 24, *supra* note 241; Newfoundland, "Judicature Act", s. 57, *supra* note 241; New Brunswick, "Judicature Act", s.22(3) *supra* note 241; Quebec, Art. 95 C.C.P, *supra* note 241.

⁵⁶⁶ British Columbia, "Constitutional Question Act", s. 8, *supra* note 238; Nova Scotia, "Constitutional Questions Act", s.10, *supra* note 236; Manitoba, "Constitutional Questions Act", s. 3, *supra* note 241; Ontario, "Ontario Courts of Justice Act", s. 109(1), *supra* note 236; P.E.I. "Supreme Court Act", s. 41, *supra* note 241; *Federal Courts Act*, *supra* note 368, s. 57(1).

which now requires notification for primary legislation, regulations and common law rules.⁵⁶⁷

Moreover, notice is not only required where the validity of legislation is under attack, but also in some jurisdictions where it has been applied unconstitutionally. Canadian jurisdictions follow three different approaches. In the first, Alberta and Newfoundland only require notification for issues concerning the “constitutional validity” of an act.⁵⁶⁸ In the second, New Brunswick provisions refer to acts which are “constitutionally valid or operative”.⁵⁶⁹ Article 95 of the Quebec *Code of Civil Procedure* distinguishes between acts that “may be declared inapplicable constitutionally, invalid or inoperative, or of no force and effect” with regard to either the *Charter of Rights and Freedoms* or the *Quebec Charter of Human Rights and Freedoms*.⁵⁷⁰ In the majority of Canadian jurisdictions, notice to the Attorney(s) General in both cases of “constitutional validity” and “constitutional applicability” is required in British Columbia, Nova Scotia, Manitoba, Ontario, Prince Edward Island, Saskatchewan, the Federal Court and the Supreme Court of Canada also requires notice for the constitutional “validity” or “applicability” of common law rules.⁵⁷¹

Pinard states that notice is based on protection of democratic will, *audi alteram partem* and the presumption of constitutionality.⁵⁷² However, notice requirements also confirm the absence of a general presumption of constitutionality because they do not simply apply in instances where legislation is allegedly unconstitutional, but where it is alleged that it was applied in a manner that is unconstitutional. In the context of federalism litigation, which relies on a general presumption of constitutionality, it was established

⁵⁶⁷ *Rules of the Supreme Court of Canada*, s. 60(1), *supra* note 565.

⁵⁶⁸ Alberta, “Judicature Act”, *supra* note 241; Newfoundland, “Judicature Act”, *supra* note 241.

⁵⁶⁹ New Brunswick, “Judicature Act”, *supra* note 241.

⁵⁷⁰ Art. 95 C.C.P.

⁵⁷¹ British Columbia, “Constitutional Question Act”, *supra* note 238; Nova Scotia, “Constitutional Questions Act”, *supra* note 236; Manitoba, “Constitutional Questions Act”, *supra* note 241; Ontario, “Ontario Courts of Justice Act”, *supra* note 236; P.E.I., “Supreme Court Act”, *supra* note 241; Saskatchewan, “Constitutional Questions Act”, *supra* note 241; *Federal Courts Act*, *supra* note 368, s. 57(1); *Rules of the Supreme Court of Canada*, *supra* note 565.

⁵⁷² Pinard, “Avis préalable”, *supra* note 242 at 632-34.

that notification is not necessary for questions of statutory interpretation.⁵⁷³ Thus, in the context of federalism litigation, the fact that a statute can be applied to certain areas beyond the realms of either provincial or federal jurisdiction does not automatically trigger a constitutional question, but merely a question of statutory interpretation, and in the absence of any likely possibility of resolving this issue, thereupon a duty to notify the Attorney General.

b) Rationale for Notice Requirements

The rationale for notifying the Attorney General issue under s. 109 of Ontario's *Courts of Justice Act* was addressed in *Eaton v. Brant County Board of Education*.⁵⁷⁴ Speaking for the majority, Sopinka J. stated:

The purpose of s. 109 of the *Courts of Justice Act* is obvious. In a constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity.⁵⁷⁵

This case concerned the validity of primary legislation, although it is difficult to see how the “obvious” purpose of notification requirements is to protect constitutional democracy. This rationale is questionable in two respects. First, some cases have seen “constitutional concessions” by the Attorney General that a law is unconstitutional. This has prompted questions about the legitimacy of such concessions, which could be interpreted as a relinquishment of the Attorney General’s public mandate.⁵⁷⁶ At the outset, nothing in notice requirements obliges the Attorney General to defend the legislation in the face of the attack. For instance, in *Re Blainey*, the Attorney General of Ontario did not defend the

⁵⁷³ McKay, *supra* note 301.

⁵⁷⁴ [1997] 1 S.C.R. 241 [*Eaton*], rev’g (1995), 123 D.L.R. (4th) 43 (Ont. C.A.) [*Eaton CA*].

⁵⁷⁵ *Eaton*, *ibid.* at 264-65.

⁵⁷⁶ G. Huscroft, “The Attorney General and *Charter* Challenges to Legislation: Advocate or Adjudicator?” (1995) 5 N.J.C.L. 125; *contra* K. Roach, “The Attorney General and the *Charter* Revisited” (2000) 50 U.T.L.J. 5.

constitutionality of the *Ontario Human Rights Code*, but sided with the plaintiff.⁵⁷⁷ Nevertheless, it would be unfortunate to allow a valid piece of legislation be struck down because of lack of adequate defence, although such situations are politically impossible and mitigated by the possibility of third party intervention, as was the case in *Blainey*. Thus, the rationale for notice requirements is not a mere duty of contradiction and the protection of “constitutional democracy”, but a wider, and therefore more flexible mandate of protecting the Constitution. Indeed, the Constitution would not tolerate a law that obliged the government to defend another law that was contrary to the *Charter*.

Second, the rationale of constitutional democracy is difficult to accept because all enactments require notification, regardless of their nature: primary legislation, regulations, or by-laws, and generally whenever the violation of a constitutional right is claimed. Thus the general rationale of s. 109 is not to protect the enactments of democratically elected institutions. Notice requirements would be legitimate if primary enactments are in question, but it is difficult to see what the rationale is where the validity of primary legislation is not under attack, particularly where the issue is not one of federalism. Moreover, some jurisdictions equally require notification when a remedy is claimed on the basis of s. 24(1) of the *Charter*. This is the case of Saskatchewan, British Columbia, Nova Scotia, Manitoba and Ontario.⁵⁷⁸ Thus, because notice requirement presuppose the protection of constitutional democracy, these jurisdictions treat the violation of rights and the unconstitutionality of primary legislation co-substantively.

Some authors have provided clearer interpretations of the rationale of notice requirements. R.G. Richards argues that the purpose of notice requirements for *Charter* arguments is, in addition to the traditional problem of engaging interests beyond the immediate dispute, to enable the development of an appropriate evidentiary record for s. 1 inquiries.⁵⁷⁹ Moreover, he states that government is often in the only position to produce a satisfactory explanation of the rationale of an impugned law or program. This argument

⁵⁷⁷ *Re Blainey*, *supra* note 353.

⁵⁷⁸ *Supra* note 566.

⁵⁷⁹ R.G. Richards, “The Notice Provision in the Constitutional Questions Act” (1989) 53 Sask. L.Rev. 153-54.

therefore implies that it is the government's duty to provide an explanation for the purpose of a law, and because such a purpose is difficult to discern, than it should not be the plaintiff's duty to engage in such speculation. Pinard also says that governments may have an interest in defining the delegation of power to an administrative authority because it requires the interpretation of primary legislation.⁵⁸⁰ However, these may be helpful in understanding the utility of notice, although it is not entirely satisfactory because discerning a statutory objective is not exclusively a constitutional issue, and such a rationale would imply notice be required where the purpose of an *Act* is unclear, and not simply under attack.

However, this raises a problem concerning the distinction between administrative law remedies and s. 24(1) remedies, confirmed in *Blencoe*,⁵⁸¹ where the majority ruled that a stay of proceedings could be granted on either the basis of s. 24(1) of the *Charter*, or under administrative law principles of natural justice. This distinction is questionable since it had been confirmed in *Eldridge* that since Parliament and the legislatures may not violate the *Charter* themselves, they may not authorise others to do so.⁵⁸² As a result, all interpretations of valid legislation must therefore necessarily be compatible with the *Charter* in the sense that they cannot imply unreasonable limitations of individual rights. The question is therefore why should notification be necessary for a stay of proceedings under s. 24(1) but not for common law principles of natural justice. On a wider level, this opens the question as to why remedies for the exercise of statutory powers should be classified as "constitutional" and treated procedurally as challenges to constitutional democracy, while others providing identical relief should not.

⁵⁸⁰ Pinard, "Avis préalable", *supra* note 242 at 645.

⁵⁸¹ *Blencoe*, *supra* note 159.

⁵⁸² *Eldridge*, *supra* note 153.

3. Role of State Action in Determining Cause of Action

In *Dolphin Delivery*,⁵⁸³ the Supreme Court stated that the *Charter* does not apply to private law relation, but under s. 32(1) only to “government”. Thus, *Dolphin Delivery* can be interpreted as holding that the *Charter* constitutes a theoretical cause of action against government, and hence does not apply where the defendant is not such a public authority. This has been the accepted interpretation of *Dolphin Delivery*, but others are possible. Nevertheless, MacIntyre J. ruled that the common law prohibition of secondary picketing in that case was a “justifiable infringement” under s. 1 of the *Charter*.⁵⁸⁴ Thus, his majority ruling could also imply that the plaintiff did not demonstrate sufficient cause of action in the factual sense so as to be entitled to a judicial remedy.

It is important to note that in Canada, the term “judicial review” does not necessarily describe any particular “form of action” since both “action” or “application” forms may be used in order to obtain redress against a public authority. Thus, the term “judicial review” by definition implies judicial intervention vis-à-vis a public authority. This flexible position in Canadian law allows individuals to choose between either procedure, depending on their evidentiary needs, in order to obtain review in both fields of constitutional and administrative law. This solution is arguably more workable than that adopted in English public law, where judicial review is only available through the “application” procedure. As a result, the English notion of judicial review as “cause of action” is co-substantive with the “form of action” used by the litigant – the simplified application procedure.⁵⁸⁵

⁵⁸³ *Dolphin Delivery*, *supra* note 6.

⁵⁸⁴ *Ibid.* at 592.

⁵⁸⁵ The English position is unlikely to be transposed to Canada, given the absence of any leave requirement for review. In the U.K., such a requirement for applications for judicial review prompted the parallel use of the action procedure. Accordingly, in *O'Reilly v. Mackman*, the House of Lords held that using the action procedure for judicial review constitutes an abuse of process. See *O'Reilly v. Mackman*, [1983] 2 A.C. 237 (H.L.). However, in the wake of *O'Reilly*, procedural requirements have become an important concern, thus prompting the criticism that by divorcing public from private law forms of action, the House of Lords has reestablished the writ system. See Wade & Forsyth, *supra* note 10 at 649. Thus, “private law” claims such as damages refer to the action procedure, whereas “public law” claims refer to the application procedure.

However, Canadian Courts have consecrated the autonomy of judicial review under the *Charter* and judicial review in administrative law, by distinguishing their respective scopes of application: “government” for the purposes of s. 32(1) of the *Charter* and the wider circle of “public decision makers” for the purposes of administrative law remedies. While the fact that a statute specifies that it binds the Crown has never implied that it is restricted thereto,⁵⁸⁶ there is evidence that drafters purported to limit the *Charter* as a cause of action exercised exclusively against “government”.⁵⁸⁷ Nevertheless, the double standard of public action has introduced additional difficulty to the already straining task of differentiating public and private activities and authorities.

The distinction between government and “public decision makers” reflects the Constitution because s. 32(1) restricts the scope of the *Charter* to the former. Moreover, it demonstrates that institutions falling within the state action “core” can be subject a greater judicial scrutiny than those outside its perimeter, and that the *Charter*, which protects not only rights by fundamental freedoms will protect those more for institutions falling outside the inner perimeter. However, because judges draw their power from the Constitution, and legislatures and Parliament cannot authorise the violation of the *Charter*, it is difficult to accept the distinction between the two as depicting an autonomous sphere of application of the *Charter*. Moreover, because the general trend in public law has illustrated a shift from a theoretical to a fact-based notion of cause of action, it can also be concluded that the introduction of the state action constitutes an unwelcome regression.

However, where both are sought, individual may use the action procedure. See *Roy v. Kensington and Chelsea and Westminster Family Practitioners Committee*, [1992] 1 All E.R. 705 (H.L.).

⁵⁸⁶ P.W. Hogg & P.J. Monahan, *Liability of the Crown* (Toronto: Carswell, 2000) at 283-84.

⁵⁸⁷ During Parliamentary debates on the drafting of the *Charter*, Justice Minister Jean Chrétien argued that the *Charter* should not apply to private individuals because this would make every issue constitutional, and thus subject to constitutional amendment. Testimony of J. Chrétien, Minister of Justice of Canada, in *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 1st Session of 32nd Parliament (January 29, 1981) at 48:28.

a) Judicial Review of Decisions Taken by Authorities Not Qualifying as “Government” under the *Charter*

At the outset, there are many institutions to which the *Charter* would not apply, but which nevertheless are subject to judicial powers of review. In *United Church of Canada* where, the Ontario High Court justified judicial review of a church by its incorporation through federal statute.⁵⁸⁸ In another decision, the Ontario Court of Appeal held that the same church was subject to judicial review because it “ministers to the spiritual needs of a large segment of the Canadian public”.⁵⁸⁹ Even though these rulings have never reached the Supreme Court, it is easy to conclude that it would disqualify such entities as “government” for the purposes of the *Charter* because they are not under government control, nor implementing a specific government policy, nor have powers granted to them that would differentiate them from a natural person. D. Mullan argues that allowing for the common law review of such institutions is too an extensive interpretation of the notion of statutory power.⁵⁹⁰ He stresses that care should be taken to avoid an “undifferentiated application of public or administrative law standards or grounds of review”.⁵⁹¹ In approval of contrary solutions, he cites British Columbia courts which refused to provide judicial review remedies in relation to “fringe situations” involving trade unions, churches and clubs.⁵⁹² Also, should Mullan’s opinion be followed by the Supreme Court, such entities would generally not qualify as wielding “statutory powers”.⁵⁹³ This would normally lead one to the conclusion that judicial review under general principles of administrative law and judicial review under the *Charter* stand aligned.

⁵⁸⁸ *Davis v. United Church of Canada* (1991), 8 O.R. (3d) 75 (H.C., Div. Ct.), basing itself on the *United Church of Canada Act*, S.C. 1924 (14 & 15 Geo.5) c. 100.

⁵⁸⁹ *Lindenburger v. United Church of Canada* (1987), 17 C.C.E.L. 172 (Ont. C.A.).

⁵⁹⁰ Mullan, “Margins”, *supra* note 213 at 147.

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.* at 146-47.

⁵⁹³ *Ibid.*

However, the Supreme Court ruling in *Lakeside Colony of Hutterian Brethren v. Hofer* demonstrates a very clear distinction between what it calls “public decision makers” for the purposes of common law judicial review and “government” for the purposes of judicial review under the *Charter*.⁵⁹⁴ This case concerned the exercise of “common law judicial review” over a *Hutterite* colony, an entity well beyond any of the definitions of “government” extracted from s. 32(1). Here, the Supreme Court held by a majority of six to one that the colony – a semi-religious order based on communal property, had not followed adequate procedural safeguards in deciding the expulsion of one of its members, and thereby depriving him of his common share of the property.⁵⁹⁵ The core issue in this case, however, should not have been whether the Supreme Court had jurisdiction to exercise judicial review – common law or *Charter*, but whether judicial review was the most effective means of resolving the dispute. The community had specifically been incorporated under statute.⁵⁹⁶ Moreover, the Colony’s Constitution provided it with “the power to power to make rules, regulations or by-laws so long as they are not contrary to the Constitution or the Law.”⁵⁹⁷ It could be said that this provision should not have distinguished the colony from any corporation, which all have their own internal regulatory powers. Moreover, incorporation has never entailed the qualification of a legal entity as a “public decision maker” for the purposes of judicial review.⁵⁹⁸

In deciding the case, the Supreme Court ruled that the colony was a “public decision maker” for the purposes of judicial review under general principles of administrative law. In her dissenting opinion, McLachlin J. stated that in the Court had failed to appreciate the values and practices of the colony, although she does not specify whether or not she deems the intervention by means of judicial review justified.⁵⁹⁹ D. Mullan supports this view, although he says that judicial intervention may be justified in certain situations if

⁵⁹⁴ *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 [*Hofer*].

⁵⁹⁵ McLachlin J. dissenting.

⁵⁹⁶ *Act to Incorporate the Hutterian Brethren Church*, S.C. 1951, c. 77.

⁵⁹⁷ Art. 2 (f) of the *Constitution of the Hutterian Brethren and Rules as to Community of Property*: see *Hofer* at 177.

⁵⁹⁸ Mullan, “Margins”, *supra* note 213 at 142.

⁵⁹⁹ *Hofer*, *supra* note 594 at 228-33.

the body in question has not followed its own procedure.⁶⁰⁰ He concludes that *Hofer* demonstrates that the Supreme Court “has yet to come to terms with the dimensions of the phenomenon of the intersection between public and private domains. It has still to develop coherent principles for dealing with the various manifestations of this problem.”⁶⁰¹ However, using public law remedies in private law relations is not the most effective means of protecting individual freedom, nor even resolving the dispute at hand, especially when other means of redress such as actions in contract, tort or unjust enrichment are readily at hand. In addition, even if public law remedies may have been appropriate to resolve this case, it is difficult to view the *Charter* as legally irrelevant and inapplicable insofar as it guarantees freedom of expression.

Conversely, certain cases illustrate that the *Charter* has been used against authorities falling within the traditionally “fluid” scope of administrative action, particularly when the facts of their situation evidence sufficient cause of action. For instance, in *Black v. Law Society of Alberta*, the Supreme Court ruled that a law society was subject to judicial review under the *Charter*, in order to determine whether its rules conformed to the Constitution.⁶⁰² However, this solution is exceptional and does not fit into the general scheme developed by the Supreme Court of Canada, thereby restricting the *Charter*’s applicability to a more intimate circle of public authorities than those traditionally recognized by administrative law. Thus the question: can judicial review of “public decision makers” be seen as beyond the reach of the *Charter*?

b) Nature of Distinction between “*Charter*” and “Non *Charter*” Judicial Review

The difference between the scope of the *Charter* and the scope of administrative law can reflect the theoretical notion of “cause of action” but it can also imply the greater burden of demonstrating cause of action in fact in instances regarding the behaviour of authorities nearing the perimeters of traditional government functions. For Hogg, the

⁶⁰⁰ See e.g. *McCaw v. United Church of Canada*, [1991] 37 C.C.E.L. 214 (Ont. C.A.), cited in Mullan, “Margins”, *supra* note 42 at 149.

⁶⁰¹ *Ibid.* at 150.

⁶⁰² [1989] 1 S.C.R. 591.

“application of the *Charter*” asks: who has the benefit and burden of fundamental rights.⁶⁰³ The state action doctrine asks one part of this, namely who has the burden of fundamental rights, i.e. what is government. The state action doctrine is therefore linked to standing because the burden of a right cannot be assessed without asking who can benefit from a constitutional right. Thus, it is open to question to what extent these two doctrines share the same terrain. Just as the doctrine of standing, the requirement of state action as a precondition for challenging the constitutionality of government action reflects the autonomous nature of the *Charter* as a cause of action, especially since the notion of state action and administrative action have been defined autonomously.

Moreover, it is not clear how state action and standing can clearly be distinguished from one another. This is particularly difficult given the lack of clarity as to the exact question the state action doctrine seeks to answer. For Tribe, state action asks not a question, but a series of questions.⁶⁰⁴ Essentially, state action seeks to define the scope of constitutional rights, although its practical purpose is determining whether they can be invoked against a particular party in court, i.e. whether and authority should bear the burden of a constitutional right. Similarly, the traditional doctrine of standing determines “who can raise judicial proceedings” with regard to a specific ground of review. Thus, state action could differ from standing because it is concerned with the burden of rights, rather than knowing which party can invoke them in court. However, because it is difficult to assess the benefit of fundamental rights without considering their burden, the doctrines of standing and state action inevitably collapse into one as different techniques for screening claims.

Much of the argument that the *Charter* does not apply to private action, relies on the assumption that the application of the *Charter* to a certain area necessarily implies a successful *Charter* claim. This is particularly the case of authors who analyse *Charter* rights independently from their reasonable limits provided under s. 1, or do not take into account the possibility that *Charter* rights, such as equality and freedoms of expression

⁶⁰³ Hogg, *Constitutional Law*, *supra* note 9, Ch. 34.

⁶⁰⁴ Tribe, *American Constitutional Law* 1988, *supra* note 712 at 1720.

can be analysed as interdependent considerations. For instance, in supporting a limited application of the *Charter* to “government”, Hogg states: “If I were to refuse to permit Anglicans to enter my house, my refusal would be an act authorised by the common law, and therefore subject to *Charter* review.”⁶⁰⁵ However, there is no reason why such a decision would not be protected under freedom of expression. Indeed, many cases now have shown that discrimination and freedom of expression can be analysed as complements to one another, particularly for areas of action falling beyond the traditional framework of government.⁶⁰⁶ In these cases, the issue was not whether freedom of expression should take precedence over freedom from discrimination but whether an institution’s decision being judicially reviewed would be able to escape, nor be denied protection under the *Charter* simply because it did not qualify as “government”.

B. AUTONOMY OF CONSTITUTIONAL AND ADMINISTRATIVE LAW STANDARDS OF REVIEW

Because it provides a mechanism for determining the intensity of judicial scrutiny, the *Charter* introduces not only grounds of review, but also a standard of review, which in contrast to that at common law, functions dynamically through the interplay of the burden of proof of the plaintiff who must demonstrate a *prima facie* violation of rights, and the burden of proof of the government under the limitation clause – s. 1. In contrast, standards of review traditionally used in administrative law, although portrayed as

⁶⁰⁵ Hogg, *Constitutional Law* at 34.2(g).

⁶⁰⁶ See for instance *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, regarding the right of a private university to condemn homosexuality in its teachings. See also *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, concerning a Board of trustees’ decision not to approve a children’s school book depicting same sex couples.

representing a spectrum of variations,⁶⁰⁷ have generally been set at three levels: patent unreasonableness, reasonableness and correctness. This duality of intensity of judicial scrutiny reflects the autonomy of the *Charter* as cause of action but is difficult to sustain because standards of review at common law have always been on constitutional considerations,⁶⁰⁸ and as part of the Constitution, such standards cannot be determined autonomously from other constitutional considerations, namely constitutional rights.

Nevertheless, both administrative law and *Charter* standards of review have been criticised. For instance, D. Beatty argued that “Deference offends the principle of constitutional supremacy because it allows gratuitous (unnecessary) restrictions to be imposed on people's rights and freedoms which could never be regarded as “reasonable” limits in societies which claim to be “democratic and free”.”⁶⁰⁹ However, the gradation of judicial standards of review can be said to ensure precisely the opposite, by allowing judicial scrutiny to vary according to the nature of authority under review. Thus, in *Dickason v. University of Alberta*,⁶¹⁰ the Court did not indiscriminately transpose s. 1 analysis to construct a standard of review for private action under provincial human rights legislation. Rather, the majority adopted a more flexible test since the actions under scrutiny were not those of government.

In addition, the notion of standard of review is fundamental to adjudication because like situations should be interpreted in a like manner and review should not be more intrusive than necessary. Thus, regardless of grounds used to argue a case (*Charter*, *Bill of Rights*, common law ...), statutes should receive like interpretations for like circumstances. As Wechsler argued: “The man who simply lets his judgment turn on the immediate result may not, however, realise that his position implies that the courts are free to function as a

⁶⁰⁷ *Pezim*, *supra* note 420.

⁶⁰⁸ D.P. Jones, “Standards of Judicial Review”, in P. Anisman & R.F. Reid, eds., *Administrative Law Issues and Practice* (Toronto: Carswell, 1995) 13 [Jones, “Standards”].

⁶⁰⁹ D. Beatty, “Canadian Constitutional Law in a Nutshell” (1998) 36 *Alberta L. Rev.* 605 at 623.

⁶¹⁰ [1992] 2 S.C.R. 1103 [*Dickason*]. L'Heureux-Dubé and McLachlin JJ. applied a strict version of the *Oakes* test, while Cory J. with the concurrence of La Forest, Gonthier, and Iacobucci JJ. only used *Oakes* as a guideline. The dissenting opinion argued a more “flexible test” should allow legislative bodies to arbitrate between competing interest, although the university which had adopted the litigious policy was not one to which deference should normally be paid.

naked power organ”.⁶¹¹ Thus, defining an appropriate standard of review ensures consistency and that the solution transcends the immediate result to be achieved.⁶¹²

Nevertheless, the greater intensity of review offered by constitutional rights has implied that individuals have many advantages in litigating their case as one of constitutional law. In this respect, it is difficult to accept the distinction between constitutional and administrative law judicial standards of review in Canadian public law because the intensity of review should not vary according to the argument used to litigate a case. Indeed, the dual intensity of review gives the onlooker the false impression that until the introduction of the Canadian *Charter*, the common law was oblivious to considerations of racial discrimination and other rights now receiving constitutional protection. Thus, the question is not whether judges should look at some issues more intensively than others. Rather, it should be asked whether traditional administrative law standards of review can remain hermetically isolated from constitutional considerations, particularly when there has been no lack of emphasis that the *Charter* and the common law should develop in unison.

1. Irrelevance of Statutory Objectives in Assessing Constitutionality of Administrative Action

One essential characteristic of review of government action under the *Charter* has been the irrelevance of statutory objectives in assessing the constitutionality of government action. However, while this principle is respected in the context of federalism, it is often set aside or ignored in the context of the *Charter*. For instance, in *Committee for Commonwealth of Canada v. Canada*,⁶¹³ the Supreme Court was asked to verify the constitutionality of airport regulations concerning the prohibition of political activities

⁶¹¹ H. Wechsler, “Toward Neutral Principles of Constitutional Law” (1959) 73 Harv. L. Rev. 1 at 12.

⁶¹² *Ibid.* at 15.

⁶¹³ *Committee for Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 [*Committee for Commonwealth*].

within airport vicinity. The inquiry initiated by the court as to whether the regulation constitutes a “limit prescribed by law” focused on understanding whether the instrument was precise enough to constitute a constitutional exercise of power, or was published as a statute. Thus, while some members of the Court ascribed such powers to the Crown’s prerogative to manage its property, others who did not concur on this point determined whether the regulations were lawful “in a free and democratic society” as opposed to the specific legal context in which they were mandated, i.e. ss. 25 and 26 of the *Department of Transport Act*,⁶¹⁴ legislation which the ruling did not even refer to. Moreover, some judges have even sought to provide a theoretical justification of the autonomy of delegated legislation from its empowering instrument. In *C. Battison & Sons Inc. V. Mauti*, it was held that “When a municipal council enacts by-laws properly within its authority, it is not enacting a by-law under a statute of a province, but enacting a by-law within its own jurisdictional power”.⁶¹⁵

In contrast, it is a “basic principle of law” that subordinate legislation cannot conflict with its parent legislation,⁶¹⁶ or with other Acts of Parliament.⁶¹⁷ This is also reflected in the general principle – *delegatus non potest delegare* – which does not prohibit sub-delegation, but affirms that the delegating authority remains responsible.⁶¹⁸ Conversely, “it is a basic principle of constitutional theory that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so.”⁶¹⁹ In addition, as Hogg stated, and subsequently quoted by the Supreme Court:

“[T]he limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decision and all other action (whether, administrative or judicial) which depends for its validity on statutory authority.”⁶²⁰

⁶¹⁴ R.S.C, c. 79, s. 1.

⁶¹⁵ *C. Battison & Sons Inc. V. Mauti* (1985), 50 O.R. (2d) 599 (H.C.J.) at 602, cited in Pinard, “Avis préalable”, *supra* note 242 at 644.

⁶¹⁶ *Belanger v. Canada* (1916), 54 S.C.R. 265; cited in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

⁶¹⁷ *R. & W. Paul, Ltd. v. Wheat Commission*, [1937] A.C. 139 (H.L.).

⁶¹⁸ J. Willis, “Administrative Law and the British North America Act” (1939) 53 Harv. L. Rev. 251.

⁶¹⁹ *Eldridge*, *supra* note 153 at 654.

⁶²⁰ Hogg, *Constitutional Law*, *supra* note 9 at 34.2(c), quoted by the Supreme Court of Canada in *Blencoe* *supra* note 159 at 333; *Eldridge*, *supra* note 153 at 644; *Slaight*, *supra* note 273 at 1078.

On the one hand, it is clear that delegations of power are often vague and do not provide much guidance as to their limits. On the other, asking whether regulations are constitutional with regard to the *Charter* has the effect of polarising argument and renders the search for limits on regulatory power a much wider inquiry than it needs to be. Moreover, its approach is analytically dubious because it assumes that “provided they respect the *Charter* and federalism, government and administrative authorities can do whatever they please”. However, aside from residual prerogative powers, the Canadian constitution does not grant autonomous regulatory powers to governmental authorities. Irrespective of the scope of powers administrative authorities should have, it is agreed that executive and administrative branches of government hold their powers from statute. This means that executive and administrative branches of government must only act within the limits of powers they have been allotted, or residually retain by prerogative. It does not suffice that they do whatever they please, provided they respect the *Charter* and federalism in their actions: they must receive a prior mandate from Parliament or the legislatures.

2. Greater Intensity of Review under the *Charter*

It is generally assumed that, lacking any “counter-majoritarian difficulty” the review of government action under the *Charter* poses less of a conflict of legitimacy than the review of legislation. Thus, the absence of electoral legitimacy on the part of administrative authorities would render the review of their decisions relatively uncontroversial. However, because they draw their legitimacy from their expertise, rather than, as Parliament and legislatures, from their accountability, the review of administrative decisions under the *Charter* is inherently more problematic because it involves judging the decision of an authority whose acquired knowledge of a particular type of problem is acutely more polished than that of a superior court judge.

Nevertheless, review under the *Charter* is not fundamentally different from review under administrative law grounds of review insofar as both are means of reviewing government action, not appealing it. However, because of its open-texture, the *Charter* is often described as introducing a statutory right of appeal. For instance, Lamer C. J. stated in *Slaight Communications*:

“As this order was not unreasonable, it is not the function of this Court to examine its appropriateness or to substitute its own opinion for that of the person making the order, unless of course the decision impinges on a right protected by the *Canadian Charter of Rights and Freedoms*.”⁶²¹

This confusion stems from the fact that the standard of “appropriateness” or “correctness” has traditionally asked whether a governmental decision is “right or wrong”,⁶²² and therefore been synonymous with judicial appeal. Thus, stating that government decisions that infringe the *Charter* will be assessed according to the standard of correctness is problematic because this would imply that the *Charter* introduces a statutory right of appeal. Lamer C.J.’s statement therefore confuses judicial review under the *Charter* and statutory appeals. As Wade explains, “On an appeal the question is ‘right or wrong?’ On review the question is ‘lawful or unlawful?’”⁶²³ As is known, appeals, which are an incursion on the separation of powers, are generally more intrusive upon executive or administrative discretion. Thus, they must be authorized by the legislation on a case-by-case basis, whereas review is characterized as an inherent judicial function. Rights of appeal are therefore statutory, whereas review, which is never a right in itself, is the exercise of inherent judicial power and need not be permitted by legislation. Thus judicial review is not one moral judgment over another, but an examination of whether or not an administrative authority has violated the law, and when it has, the quashing of its decision and its remission to be taken over again.

⁶²¹ Per Lamer J. in *Slaight* *supra* note 273 at 1074. See also Strayer J.A. in *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 at 664, stating “The Court is not ... asked to affirm the correctness of the Minister's opinion but only to determine whether there is any lawful basis for ... review.”

⁶²² Mullan, *Administrative Law*, *supra* note 10 at 542.

⁶²³ Wade & Forsyth, *supra* note 14 at 33.

The standard of “appropriateness” or “correctness” referred to Lamer C.J. and statutory appeals are therefore different insofar as the former remits the invalid decision to the decision-maker, whereas the latter does not. This distinguishes correctness from the elusive American doctrine of “*de novo* review” of “constitutional facts”,⁶²⁴ which purports to make a final determination on an issue the government made, but do so on a new factual record.

The distinction between the standard of correctness, the standard of “no deference”, and judicial appeal is not always clearly acknowledged. It is often said that correctness allows a court to substitute its decision to that of the previous decision-maker. However, while contrary opinions have emerged, the Supreme Court has sought to distinguish the correctness standard from that of “no deference”.⁶²⁵ In *Human Rights Commission v. Borough of Etobicoke*, McIntyre J. stated “[t]he appellate court is specifically empowered to review the evidence and substitute its own findings for those of the board of inquiry....”.⁶²⁶ *A contrario*, review has never allowed courts to substitute their decision to that of the previous decision-maker since review necessarily entails the remission of the invalid decision to the initial decision-maker. Ultimately, this implies (1) that correctness review is still a form of review because incorrect decisions are remitted by courts to the initial decision-maker, and (2) review under the *Charter* is still a form of review even though it is exercised according to the standard of correctness.⁶²⁷ This clarification being made, there are still means of illustrating the greater intensity of review under the *Charter*.

⁶²⁴ J.A. Shechter, “De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights” (1988) 88 Colum. L. Rev. 1483. The notion of “constitutional fact” has never been given any clear definition and only holds minority authority. See K.C. Davis, *Administrative Law Treatise* 2nd ed. (San Diego, Ca.: K.C. Davis Publishing Co., 1984) § 29.23 at 441 [Davis, “Treatise”].

⁶²⁵ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.

⁶²⁶ [1982] 1 S.C.R. 202 at 211 [*Etobicoke*].

⁶²⁷ However, the Supreme Court has made exceptions to this rule. See *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772. In this case, the order of “mandamus” granted by the Court implied that the decision was not remitted for re-consideration, but taken by the Supreme Court itself.

a) Correctness as the Standard of Review under the *Charter*

The intensity of judicial scrutiny under the *Charter* is defined by s. 1, which enables courts to look into governmental justification for its actions. This implies using the framework developed by the *Oake's* test (legitimacy of objective, rational connection, proportionality). S. 1 can therefore be said to represent a standard of review,⁶²⁸ which in contrast to that in administrative law, evolves with the argument of the parties. In *Martin* and *Laseur* the Supreme Court stated:

“administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard (...). An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court.”⁶²⁹

This statement deserves two general comments. The first concerns the distinction between “correctness” and “reasonableness” as standards of review. Traditionally, the standard of correctness has implied that there is only one right answer and the administrative body’s decision must reflect it.⁶³⁰ In contrast, “reasonableness” would imply the possibility of a plurality of interpretations. This position was taken by the Supreme Court, where it stated not only would a Liquor Board not be required to be “correct” in its interpretation, but it would be entitled to err and any such error would be protected from review by the privative clause.⁶³¹ This reasoning can be compared with the U.S. Supreme Court’s ruling in *Natural Resources Defense Council v. Chevron*,

⁶²⁸ L.B. Tremblay, “La justification des restrictions aux droits constitutionnels: la théorie du fondement légitime” (2002) 47 McGill L.J. 271 at 274; see also L.B. Tremblay, “La justification des restrictions aux droits constitutionnels: affaire de rationalité ou de légitimité?” (1999) 10 N.J.C.L. 41.

⁶²⁹ *Martin* and *Laseur*, *supra* note 98 at 530; *Cuddy Chicks*, *supra* note 88 at 17; *Eaton CA*, *supra* note 574 at 7. David Mullan argues that the standard of correctness has only been required for the judicial review of legislation, not administrative decisions (*Cuddy Chicks* and *Martin* and *Laseur*). D. Mullan, “The View from North America: A Canadian Perspective on Three Troubling Issues” (2004) 17 C.J.A.L.P. 167 at 175. However, we cannot agree with him on this point since the Court did specify that “administrative tribunal decisions based on the *Charter*” are subject to the standard of correctness.

⁶³⁰ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 at 724.

⁶³¹ *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

stating that in case of statutory ambiguity, courts must defer to an interpretation, if it is among the permissible range of those available.⁶³²

However, this distinction between “correctness” and “reasonableness” is not satisfactory. It implies that statutory interpretation is based on cognition of statutory language and therefore entails one specific meaning, unless the statute allows otherwise, in which case there will be several interpretations. Thus, it denies that interpretation is an act of individual will since the possibility of differing interpretations is not a constant. As a result, while both Canadian and American solutions appear to favour the possibility of a plurality of interpretations, they ultimately concede the opposite by excluding the possibility of differing interpretations in matters of “correctness”. Indeed, any legal question is subject to a plurality of interpretations – the existence of dissenting opinions is sufficient proof thereof. In this respect, it is not surprising that statutes can be interpreted differently, although this should not prevent that the chosen interpretation, regardless of the standard, is supposed to be the most correct, the most reasonable. The distinction between reasonableness and correctness is therefore not that one allows for a variety of interpretations and the other not, but rather that the two represent different degrees of intensity of review. As a result, the standard of correctness implies that the chose interpretation must be the most correct, among those available. Similarly, the standard of “reasonableness” should not prevent that the chosen interpretation be the most reasonable.

Second, it is difficult to accept that the standard of correctness will be used if the *Charter* is invoked. In *Barrie Public Utilities v. Canadian Cable Television Assn.*,⁶³³ the dissenting opinion of Bastarache J. criticised the judgement of the Court of Appeal, stating that its decision “demonstrates to parties dissatisfied with an administrative decision that they need only frame a constitutional argument – it need not be a sound one – in order to have the decision reviewed by a court on a correctness basis. The mere

⁶³² 467 U.S. 837 (1984).

⁶³³ [2003] 1 S.C.R. 476 at 533-34 [*Barrie*].

suggestion of unconstitutionality is enough.”⁶³⁴ Thus, the sole invocation of the *Charter* should not automatically imply a greater standard of review.⁶³⁵ Another difficulty with the proposition that administrative decisions based on the *Charter* will be assessed on the standard of correctness is that even if the government does not expressly refer to the *Charter*, its decision will have to be based on it; all government decisions are necessarily subject to the *Charter*. Thus, all governmental decisions are necessarily based on the *Charter* and are therefore “*Charter* decisions”. As the Court stated in *Paul v. British Columbia (Forest Appeals Commission)*, “the principle of constitutional supremacy (...) leads to a presumption that all legal decisions will take into account the supreme law of the land”.⁶³⁶ Having regard to these difficulties, the proposition that the standard of review for *Charter* claims is one of correctness should therefore be understood as implying that government decisions risk being assessed under the standard of correctness, if it is necessary to do so. The main difference between administrative law and *Charter* standards of review is therefore that the latter evolve with argument, whereas administrative law standards of review are pre-fixed; their determination thus precedes substantive argument.

The dynamic nature of standards of review under the *Charter* has therefore enabled judges to develop concepts, which on their own would otherwise be too powerful. In this respect, common lawyers have abstained from developing a doctrine for assessing the “proportionality” of means chosen in order to achieve a given objective. According to the Court of Justice of the European Communities, the principle of proportionality requires that administrative measures must not be more drastic than is necessary for attaining the desired result.⁶³⁷ Thus, Lord Diplock stated that developing a doctrine of proportionality would amount to “using a sledge-hammer to crack a nut.”⁶³⁸ This is in part due to the fact that proportionality is sometimes described as a “ground of review”, rather than a degree

⁶³⁴ *Ibid.*

⁶³⁵ Mullan, “Judicial Deference”, *supra* note 761.

⁶³⁶ *Paul*, *supra* note 98 at 612, citing *Martin* at 533.

⁶³⁷ J. Schwarze, *European Administrative Law* (London: Sweet & Maxwell, 1992) at 677.

⁶³⁸ *R. v. Goldstein*, [1983] 1 W.L.R.151 at 155 (H.L.) [*Goldstein*].

of intensity of review – i.e. a standard of review.⁶³⁹ Indeed, proportionality has never been considered a distinct “ground for review” in European Community law and thus has never been considered as a “fundamental right in itself”.⁶⁴⁰ Just as s. 1, the Community “principle of proportionality” “merely acts as a limitation on such encroachments on those rights of the citizen which do not necessarily affect fundamental rights but can be justified only in the pursuit of mainly public interests.”⁶⁴¹

b) Problems in Maintaining Correctness Standards for Constitutional Claims

The proposition that governmental decisions are necessarily based on the *Charter* and its sole invocation cannot imply review under the standard of correctness was illustrated in *Suresh v. Canada (Minister of Citizenship and Immigration)*.⁶⁴² In this case, in spite of being argued constitutional grounds, the Supreme Court unanimously ruled that the standard of review was one of “patent unreasonableness”.

Mr. Suresh had been admitted to Canada as a “convention refugee” but later alleged to have been involved in terrorist activities. Normally, international law and the Canadian

⁶³⁹ Mullan, *Administrative Law*, *supra* note 10 at 175. But see N. Belley, “L’émergence d’un principe de proportionnalité” 38 (1997) C. de D. 245.

⁶⁴⁰ Schwarze, *supra* note 637 at 726.

⁶⁴¹ *Ibid* at 725-26. In the European terminology, measures that can be justified under the principle of proportionality are not considered as infringing individual rights. See also F.G. Jacobs, “Is the Court of Justice of the European Communities a Constitutional Court?” in D. Curtain & D. O’Keefe, eds., *Constitutional Adjudication in European Community and National Law, Essays for the Hon. Mr. Justice T.F. O’Higgins* (Dublin: Butterworth, 1992) at 31 stating that the principle of proportionality serves “as a yardstick to test the necessity and appropriateness of any measure imposing burdens on the individual.”

⁶⁴² *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 [*Suresh*]; D. W. Elliott, “*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?” (2002) 65 Sask. L. Rev. 469. See also *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72. See also *Pinet v. St. Thomas Psychiatric Hospital* 2004] 1 S.C.R. 528 provides that *Charter* rights will have to be judged in conjunction with countervailing considerations pertaining to the decision-maker’s authority such as public safety. See also the companion case: *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498. None of these cases refer to the standard of correctness. Instead, in *Pinet* the Court stated that the standard of review would be that determined by legislation: “Parliament has spelled out in s. 672.78 of the Criminal Code the precise standard of appellate review”. *Pinet*, at para. 24.

Immigration Act (now the *Immigration and Refugee Protection Act*) do not allow for the deportation of refugees to countries where they might be tortured. Exceptions were made in the *Act* for individuals who are perceived as a threat to national security. Although the Supreme Court ruled that the legislation giving the minister the power to deport refugees was not contrary to substantive fundamental justice guaranteed by s. 7 of the *Charter*, it stated that s. 7 of the *Charter* requires that an opportunity be given to the applicant in order to challenge the Minister's information in writing. Thus, in not providing him with such an opportunity, the government's denial could not be justified under s. 1 of the *Charter*.

Mr. Suresh therefore challenged the deportation order in Federal Court, arguing that the standard of review was one of correctness. However, McKeown J. of the Federal Court, Trial Division, stated that because the nature of the Minister's powers were "discretionary", the appropriate standard of review was one of reasonableness and that the deportation order was reasonable.⁶⁴³ On appeal, Robertson J.A., distinguished between constitutional and administrative law standards of review.⁶⁴⁴ He stated that constitutionally, the standard of review is whether the deportation order shocks national conscience. At the administrative law level, recognising that the Supreme Court had established three general standards of review, he refrained from selecting any one of the three, stating that the appropriate question was whether there were "substantial grounds" that the applicant would face torture upon being deported. Nevertheless, Robertson J.A. stated that even under the three administrative law standards of review, there was no basis for setting aside the Minister's decision.

The Supreme Court confirmed this dividing the determination of the standard of review into two questions. First, it determined the standard of review at administrative law and stated that a deferential approach must be taken with regard to the Minister's decision, that is, his decision is subject to a "patent unreasonableness" standard of review. It stated

⁶⁴³ [1999] 173 F.T.R. 1 (T.D.) at 13.

⁶⁴⁴ [2000] 2 F.C. 592.

that the “ultimate question”⁶⁴⁵ in determining the appropriate standard of review was legislative intent. It applied the four *Pushpanathan*⁶⁴⁶ criteria and stated that all factors pointed to a deferential approach: first, the legislation had provided a limited right of appeal; second, the Minister has access to special information and expertise; third, the purpose of the Act is to balance humanitarian considerations with those of national security; and fourth, the nature of the inquiry was “highly fact-based and contextual”.

Second, the Court distinguished between the constitutionality of the legislation and the Minister’s decision. Having recognized the validity of the legislation under which the Minister was acting, the Supreme Court determined the standard of review under the *Charter*. On the one hand, the court’s analysis implied a limited effect of the *Charter* on the Minister’s decision. Thus, it stated “the issues of constitutionality of the deportation provisions of the *Immigration Act* do not involve review of ministerial decision-making.”⁶⁴⁷ Thus, in contrast to Robertson J.A. who analysed the deportation order in both administrative and constitutional terms, it stated that the minister’s decision was not a “constitutional decision”, but that the constitutional issue was factual, namely whether the deportation of Mr. Suresh would shock the conscience of Canadians. In doing so, The Supreme Court confirmed the distinction made by Robertson J.A. between a “constitutional question” and “merely one of judicial review”.⁶⁴⁸ On the other hand, the court rejected the argument that the violation of Mr. Suresh’s rights was justified under s. 1, stating that the only justifications for the violation of s. 7 would be exceptional circumstances (i.e. natural disasters, war, epidemics), circumstances that were not applicable in the present case. In its words: “Valid objectives do not, without more, suffice to justify limitations on rights. The limitations must be connected to the objective and be proportional.”⁶⁴⁹ Although the court did not specify, the benchmark referred to in this case was undoubtedly the legislation under its proper interpretation in light of *Charter* principles and Canada’s international legal obligations.

⁶⁴⁵ *Suresh*, *supra* note 642 at 24.

⁶⁴⁶ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

⁶⁴⁷ *Ibid.* at 22.

⁶⁴⁸ *Ibid.* at 23.

⁶⁴⁹ *Ibid.*

However, the distinction between “constitutional decision” and “non-constitutional decisions” is far from clear. Presumably, it was added to justify the determination of the standard of review as one of “patent reasonableness” as opposed to “correctness”, as should have been the case since this was a decision based on Mr. Suresh’s *Charter* rights. Thus, in order to save itself from this contradiction, the court stated that the Minister’s decision was not a “constitutional decision”, but rather that the constitutional issue was factual, namely whether the deportation of Mr. Suresh would “shock the conscience of Canadians”. As a result, it *Suresh* could confirm the rule that decisions based on the *Charter* would be reviewed on the standard of correctness, unless they did not qualify as a “constitutional decision”. However, the distinction between “constitutional decisions” and “non-constitutional decisions” is highly questionable and unheard of in Canadian public law. Indeed, it is clear that the Minister is a governmental official and that the decision to deport Mr. Suresh clearly falls within the scope of the *Charter*. Moreover, the Court was clear in *Operation Dismantle* that there is no “political questions doctrine” in Canada that would bar some governmental decisions from judicial review.⁶⁵⁰ Clearly, the issue in the case was whether the Minister’s decision to deport Suresh would shock the conscience of Canadians. To qualify this as an autonomous factual issue, separate from the Minister’s decision, is difficult because it is the decision that will be affected and remanded to her in order to be re-taken.⁶⁵¹

Interpretations of *Suresh* have argued that it represents a resurgence of deference, particularly when compared with *Baker*.⁶⁵² However, little attention has been paid to the different conclusions that can be drawn on the one hand by the definition of the administrative law standard of review, and that defined under the *Charter*. Indeed, it is difficult to see how the standard of review can be qualified as one of “patent

⁶⁵⁰ *Operation Dismantle*, *supra* note 764.

⁶⁵¹ In the United States, the term “constitutional fact” has never received any clear definition since its introduction by Professor J. Dickinson. “*Crowell v. Benson*: Judicial Review of Administrative Determinations of Questions of “Constitutional Fact”, (1932) 80 U. Pa. L. Rev. 1055. The concept purported to distinguish elements of an administrative decision that could be subject to *de novo* consideration. However, the authority of the doctrine of “constitutional fact” has been reduced to minority approval. See Davis, “Treatise” and Shechter, *supra* note 624.

⁶⁵² D. Mullan, “Deference from *Baker* to *Suresh* and Beyond: Interpreting the Conflicting Signals”, in D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart, 2004).

unreasonableness”, while simultaneously stating that the decision was “proportional and connected” to the objectives of the legislation.

In spite of the uncertainty regarding the definition of individual standards of review at administrative law, courts have adopted several standards of review for one decision (i.e. issues of expertise under one standard, and issues not requiring expertise on a much lower standard of review).⁶⁵³ Similarly, Jones and de Villars argue that each legal issue can imply a separate standard of review, particularly constitutional and administrative law issues.⁶⁵⁴ However, some have expressed scepticism about such an approach. Binnie J. stated: “The Court’s task on judicial review is not to isolate these issues and subject them each to differing standards of review.”⁶⁵⁵ Bastarache J. agreed on this point although he maintained that constitutional questions should be decided on the correctness standard.⁶⁵⁶ While this author cannot deny that the various considerations of each case should not always receive equal weight, the fractioning of each legal argument into a separate consideration requiring its own analysis of standard of review is distortive and inconclusive. It may be said that on such a point, a decision must be “reasonable”, and on another, it must be “correct”. However, it remains that what is ultimately under scrutiny is the decision itself, and whether the reasons for which it was taken, as a whole, are either patently unreasonable, reasonable, or correct with regard to legislative objectives, properly interpreted in light of the Constitution.

c) Distinction between Review of Reasons and Review of Decisions

Since the advent of the *Charter*, both doctrine and the judiciary have considered “review of reasons” as a distinct issue from “review of decisions”.⁶⁵⁷ Neighboring the review of reasons is the duty to give reasons, which may arise prior to an application for judicial

⁶⁵³ See M. Bryant & L. Sossin, *Public Law* (Toronto: Carswell, 2002) at 167-68.

⁶⁵⁴ D.P. Jones, A. de Villars, *Administrative Law*, 4th ed. (Toronto: Carswell, 2004) at 514.

⁶⁵⁵ *C.U.P.E. v. Ontario (Minister of Labour)* [2003] 1 S.C.R. 539 at 590.

⁶⁵⁶ *Ibid.* at 552-53.

⁶⁵⁷ Jones, “Standards”, *supra* note 608 at 38.

review. Thus, the distinction between the eventual duty to give reasons and the review of reasons reflects the distinction between the provision of “archival reasons” and legal justification.⁶⁵⁸ However, because the provision of reasons and legal justification occur at different stages, the difference between the two is arguably more one of time than of form. Nevertheless, while such a duty to give reasons cannot be deduced from the Constitution, it is related thereto because the exercise of governmental power implies means of ensuring compliance with constitutional rights, without necessarily going as far as applying for judicial review.

Although the advent of review of reasons could be related to the *Charter*, is not a new development. The now virtually obsolescent prerogative remedy *quo warranto* still allows judges to call on an administrative official to demonstrate “by what warrant or authority” he or she is purporting to act. Moreover, nothing has prevented these questions from being raised in an application for relief in the nature of both *certiorari* and prohibition and by way of an action for an injunction. However, even after the enactment of the *Charter*, it was stated that traditional prerogative remedies do not enable the judiciary to question the merits of a decision made “within jurisdiction”.⁶⁵⁹ Thus, some have advocated that judicial review should not be limited to looking only at administrative decisions, but at the reasons for which they have been taken.⁶⁶⁰

The distinction between reviewing a decision and reviewing its reasons arose in *Eaton v. Brant County Board of Education*.⁶⁶¹ In this case, an appeals tribunal upheld the decision of a school board that a disabled child could no longer be taught in a regular classroom and had to be reassigned to a special class for disabled children. S. 8 of the *Ontario Education Act* conferred on the Minister of Education the power to make special education programs for Ontario children. The applicants argued that neither the

⁶⁵⁸ R.A. Macdonald & D. Lametti “Reasons for Decision in Administrative Law” (1990) 3 Can. J. Admin. L. & Prac. 123.

⁶⁵⁹ Gibson, *General Principles*, *supra* note 8 at 202.

⁶⁶⁰ D. Dyzenhaus, M. Hunt & M. Taggart, “The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation” (2001) Oxford U. Commonwealth L.J. 5 arguing that judicial review of administrative decisions should focus on whether the reasons given by the decision-maker are capable of justifying the decision, and not solely the decision itself.

⁶⁶¹ *Eaton*, *supra* note 574.

legislation was unconstitutional, nor the order itself since the Minister was entitled to make such an order, but the reasons for which it was made violated their rights. Arbour J.A. allowed this argument and stated that the Act had to be read in accordance with the *Charter*, quashed the tribunals' decision and remitted the matter. Although the Supreme Court allowed the appeal of Arbour J.A.'s ruling on procedural grounds, it is unclear to what extent the majority recognised a conceptual distinction between the invalidity of the order itself and the invalidity of its reasons. While concluding that "neither the Tribunal's order nor its reasoning can be construed as a violation of s. 15",⁶⁶² Sopinka J., speaking for the majority, stated:

"I do not see any purpose in distinguishing between the order of the Tribunal and the reasons for that order. That was a distinction that was sought to be made in the Court of Appeal but, in my view, the reasons and the order are to the same effect and cannot be dealt with separately in this case. Either both are valid, as I conclude, or both are invalid."⁶⁶³

Although pronounced as a constitutional issue, it is open to question as to whether this standard of review has affected administrative law. In *Baker v. Canada*,⁶⁶⁴ the government had taken a deportation order vis-à-vis an individual who had entered Canada illegally. It was without question that the government clearly had the power to take such an order. However, it appeared in the course of the trial that the reasons for the order were much deeper than initially imagined and while government had the power to take such an order, the reasons for its actions in this case went well beyond the purposes that initially had been granted to it by statute, namely, by demonstrating an attitude that fringed upon racism. Accordingly, the order was declared invalid.

Needless to say, since every decision under judicial scrutiny will have to be justified, in the sense that the reasons for its taking will have to be provided, and judicial review of administrative action is always directed at a decision,⁶⁶⁵ judicial review should necessarily be concerned with the reasons provided by an administrative authority for

⁶⁶² *Ibid.*, per Sopinka J. at 279.

⁶⁶³ *Ibid.* at 274.

⁶⁶⁴ *Baker*, *supra* note 169.

⁶⁶⁵ *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374 at 408 (H.L.).

acting in a given manner. The difference between review under traditional law and review since the enactment of the *Charter* is therefore that the former was merely concerned with examining whether or not reasons that would accord with statutory powers exist, whereas the constitutional warrant would allow judges to the reasons provided are real, rather than ostensive, and that they accord with the objectives of the statute, properly interpreted with regard to the Constitution.

This capacity to look beyond the apparent motives of decision-makers, even in matters “within jurisdiction”, reflects the proposition that the *Charter* enables judges to look “beyond jurisdiction”.⁶⁶⁶ In this respect, one often hears the proposition that a public authority has acted “*intra vires*” or “within its jurisdiction”, but has nevertheless infringed the *Charter*. This distinction is not without recalling the old distinction between “jurisdictional” and “non-jurisdictional errors”. However, this distinction has never been clear. Hogg has criticised it as being “one of the most elusive and susceptible to judicial manipulation in Anglo-Canadian law”.⁶⁶⁷ Moreover, the distinction between “jurisdictional” and “non-jurisdictional errors” is of waning importance, particularly the “pragmatic and functional approach” of the Supreme Court was extended in *Baker* to both types of errors.⁶⁶⁸

Basing itself on a restrictive notion of “jurisdiction”, the distinction between “*Charter* powers” and “jurisdictional powers” is questionable because neither legislative nor administrative branches have the power to violate the *Charter*. The question therefore arises as to whether the doctrine of jurisdiction is of any importance under the *Charter*. On the one hand, the argument that the *Charter* enables judges to look “beyond jurisdiction” emphasises that it does not. On the other, the advent of the *Charter* and the abolition of the distinction between “jurisdictional” and “non-jurisdictional” errors also confirms the evolutionary nature of “jurisdiction”. As Rubinstein noted: “Judicial review has developed in terms of want of jurisdiction. It will be noted that this development did

⁶⁶⁶ H. Janisch, “Beyond Jurisdiction: Judicial Review and the *Charter* of Rights” (1983) 43 R. du B. 401.

⁶⁶⁷ See criticism of Hogg, *Constitutional Law*, *supra* note 9 at 7.3(f); Strayer, “Canadian Constitution”, *supra* note 2 at 90-91.

⁶⁶⁸ *Baker*, *supra* note 169.

not have the effect of limiting the supervisory court's superintendence but rather of inflating the meaning of the term want of jurisdiction so as to meet all contingencies.”⁶⁶⁹

The evolutionary nature of the doctrine of jurisdiction was expressed in *Slaight Communications*, where Lamer stated that the justification under s. 1 and exceeding jurisdiction were one of the same, whether this was for Parliament or administrative authorities. Any decision that infringed the *Charter* and could not be justified with regard to s. 1 would therefore be *ultra vires*. As Lamer stated, “an administrative tribunal may not exceed the jurisdiction it has by statute.”⁶⁷⁰ Moreover, “if the action is not justified (with regard to s. 1), it has necessarily exceeded its jurisdiction”.⁶⁷¹ This view, which includes the *Charter* as part of administrative power is arguably more coherent. Thus over time, the principles that define the powers and duties of public authorities have been stretched and defined more clearly. However, the general tenet expressed by Dicey that all government action must be authorised by law has not.

d) Constitutional Reasonableness and “Reasonableness in the Administrative Law Sense”

A clear illustration of the greater intensity of judicial standards of review used to assess government action under the *Charter* is the distinction between reasonableness “in the administrative law sense”, and reasonableness under the *Charter*.

In *Slaight Communications*, Dickson C.J. argued that the administrative law standard of reasonableness lacks the sophistication of analysis developed under s. 1 of the *Charter*.⁶⁷² Nevertheless, he stated that the relationship between administrative law standards of

⁶⁶⁹ Rubinstein, *supra* note 248 at 81.

⁶⁷⁰ Per Lamer J. in *Slaight*, *supra* note 273 at 1078, accord: Hogg, *Constitutional Law* *supra* note 9 at 5.5 (b) stating that action that violates the *Charter* is *ultra vires*.

⁶⁷¹ *Slaight*, *supra* note 273 at 1080.

⁶⁷² *Ibid.* at 1049.

review and the notion of “reasonable limitation” in the *Charter* would have to be clarified.⁶⁷³ In *Slaight*, the employer had argued that the orders were not reasonable under principles of administrative law. In doing so, he invoked an earlier judgment of the Supreme Court – *National Bank of Canada v. Retail Clerks International Union*, which concerned an order to the effect that a bank write a letter expressing the Bank’s repentance for using unfair labour practices and support for the *Canada Labour Code*.⁶⁷⁴ Although this case had been decided exclusively with regard to the common law, thereby quashing the order as “patently unreasonable”, Beetz J. suggested in a concurring judgment that the orders in this case were equally contrary to s. 2(b) of the *Charter*. This contrast in the content and purpose of the orders suggests that those required in *National Bank* would not have been justified with regard to s. 1. The precise relationship between the administrative law notion of reasonableness and “reasonable limitations” under s. 1 was left to be clarified in further cases, although the reference to “reasonableness in the administrative law sense” suggested that both concepts were not recognized as confluent.

This was confirmed in *Ross v. New Brunswick School District No. 15*.⁶⁷⁵ In this case, a public school teacher had published several books against Jews and expressed his thoughts on this matter publicly in his out-of-school activities. The ruling given by La Forest J. in *Ross* confirms the methodology in *Slaight*, although it goes further by confirming the uncertainty concerning expressed by Dickson C.J. and transforming it into a substantive legal rule. Thus, La Forest J. recognised that the administrative law standard should not be more onerous than that under the *Charter* but that the administrative law standard and the *Charter* standard had not “conflated into one”.⁶⁷⁶ The reason for this was that where the issues remained untouched by the *Charter*, the administrative law standard of review would still apply. In this respect, the *Charter* provided a narrower form of protection. Moreover, where the two standards of review were in question, it was clear that should the action be a “reasonable limitation” under s. 1 analysis, than it would necessarily be reasonable under principles of administrative law. Conversely, should the

⁶⁷³ *Ibid.*

⁶⁷⁴ [1984] 1 S.C.R. 269.

⁶⁷⁵ [1996] 1 S.C.R. 825 [*Ross*].

⁶⁷⁶ *Ibid.* per La Forest J. at 850-51.

limitation not be reasonable under s. 1, than it would no longer be necessary to consider the reasonableness of the order under administrative law principles, “jurisdiction necessarily having been exceeded”.⁶⁷⁷ The notion of reasonableness under the *Charter* is therefore based on the same underlying principle of jurisdiction, but the determinant analysis, and also the more “sophisticated and structured analysis of s. 1 is the proper framework within which to review *Charter* values.”⁶⁷⁸

Although the selection of standards of review should be based on precedent for the simple reason that the judiciary cannot determine its intrusiveness indiscriminately, the difference between determining what is reasonable and what is not, should not be seen as a task requiring legal training. Thus, essence of reasonableness is that it does not have any specific legal definition.⁶⁷⁹ Every person is endowed with a sense of reasonableness. This notion, when referred to by lawyers, is not restricted to legal reasonableness, but takes into account the bulk of underlying values, our common sense of logic and morality which governs our society. It is thus not a technical word and lawyers should not be held to have a deeper understanding of the notion than anyone else, especially not those without a legal education. As Lederman noted: “when Professor Thayer speaks of logic, reason and general experience, he is not thinking of highly specialised or technical senses of these terms, but rather of the common understanding that most people have of them.”⁶⁸⁰ Accordingly, L. Tremblay argued in favour of an overall standard of reasonableness, applicable to both statutes and administrative decisions.⁶⁸¹

Arguably, there is no reason why reasonableness under one body of law should not imply reasonableness under the other. However, the notion of reasonableness in Canadian administrative law has evolved so as to exclude this very element of commonality and thereby contradict the very core meaning of reasonableness. The problem is therefore not that the administrative law notion of “reasonableness” lacks sophistication of analysis,

⁶⁷⁷ *Ibid.*

⁶⁷⁸ *Ibid.*

⁶⁷⁹ See also T.R. Hickman, “The Reasonableness Principle: Reassessing its Place in the Public Sphere” (2004) 63 Cambridge L.J. 166, criticizing the autonomy of notions of reasonableness under the U.K.’s *Human Rights Act* and under its traditional administrative law definition.

⁶⁸⁰ Lederman, “Competing values”, *supra* note 134 at 137.

⁶⁸¹ “Section 7 of the *Charter*: Substantive Due Process?” (1984) 18 U.B.C. L. Rev. 201.

but simply that the notion of “reasonableness” has been static and not been given a substantive and evolutive interpretation. Accordingly, some rulings now refer to “substantive unreasonableness”.⁶⁸²

3. Re-Emergence of Unwritten Constitutional Principles under the *Charter* and Implications for Judicial Standards of Review

Since the enactment of the *Charter*, unwritten constitutional principles have made a spectacular reappearance. This is all the more surprising given the wealth of written sources of fundamental rights. Through these principles, courts have been able to increase their scrutiny over administrative action where ordinary rules of statutory interpretation do not succeed.

Unwritten constitutional principles can be traced to the pre-*Charter* debate regarding the existence of an “implied bill of rights”.⁶⁸³ However, in *Canada (A.G.) v. Montreal (City)* the majority judgement of Beetz J. rejected the implied bill of rights theory.⁶⁸⁴ Nevertheless, following the constitutional changes of 1982, Beetz J. declared in *Ontario Public Service Employees Union v. Ontario* that in addition to the *Charter*, legislatures are obliged to “conform to these basic structural imperatives and can in no way override them.”⁶⁸⁵ Moreover, in *Reference re Remuneration of Judges of Provincial court of Prince Edward Island*,⁶⁸⁶ Lamer C.J. suggested in *obiter dicta* that judicial independence was derived from the preamble of the *Constitution Act, 1867*. The unwritten or organizing principles would allow the courts to unlock the full meaning of the

⁶⁸² Per Evans J. A. (concurring) in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. (C.A.) 555 at 576. See also *Suresh CA*, *supra* note 644 at 676-77 referring to “the reasonableness standard applied in *Baker*”.

⁶⁸³ *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *Liyanage v. The Queen* [1967] A.C. 259 (P.C. Ceylon) at 260; *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

⁶⁸⁴ [1978] 2 S.C.R. 770 (sub. nom *Dupond*).

⁶⁸⁵ [1987] 2 S.C.R. 2 at 57 [OPSEU].

⁶⁸⁶ *Reference re Remuneration of Judges*, *supra* note 225.

Constitution and to flesh out its terms, even to the extent of allowing the courts “to fill out gaps in the express terms of the constitutional scheme”.⁶⁸⁷ In *Reference re Secession of Quebec*,⁶⁸⁸ the Supreme Court stated that the Canadian constitution, which was more than a written text, was based on four underlying pillars: federalism, democracy, constitutionalism, the rule of law and the respect of minorities. Nevertheless, the Court confirmed that such unwritten principles:

“could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary (...) there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.”⁶⁸⁹

In spite of these numerous references, unwritten constitutional principles have rarely been used. To this author’s knowledge, the only case where they have been vindicated is *Lalonde v. Ontario (Health Services Restructuring Commission)*.⁶⁹⁰ This case did not concern the validity of any particular piece of legislation, but the actions of public authorities taken thereunder. Recourse to unwritten constitutional principles was necessary because the *Charter* did not provide for a solution to the case, nor did common law techniques of statutory interpretation.

In this case, the Ontario Government issued directions purporting to close Montfort Hospital, a francophone hospital in the Ottawa region. This was problematic because the francophone population in Ontario had relied on the hospital and its amalgamation into the greater Anglophone hospital would undoubtedly affected the quality of language service and the opportunity for francophone physicians to be trained in French. Nevertheless, the Commission responsible for the closure stated: “Debate of this belief is not within the purview of the Health Services Restructuring Commission. Current provincial policy is specified in the *French Languages Services Act*, which provides for hospitals offering services in the French language to be designated bilingual”.

⁶⁸⁷ *Ibid.* at 69.

⁶⁸⁸ *Secession Reference*, *supra* note 375.

⁶⁸⁹ *Ibid.* at 249.

⁶⁹⁰ [2001] 56 O.R. (3d) 505 (C.A.) [*Lalonde*].

The applicant had argued that the Commission's order was discriminatory for the purposes of s. 15(1) of the *Charter*, because Franco-Ontarians constituted a "comparable group" based on their language status. They also argued that the order violated s. 16(3) concerning the protection of minority languages by discriminating against francophone minorities of Ontario. Thirdly, they alleged that the Commission's direction to close the hospital was "patently unreasonable" or "clearly irrational". However, *Charter* arguments were rejected by both the Divisional Court and the Court of Appeal because language could not be classified as an analogous ground of discrimination under s. 15(1), and 16(3) was not a "rights conferring" provision. The issue therefore hinged on non-*Charter* arguments. The Divisional Court stated that the decision to close the hospital was "patently unreasonable" because by failing to take into account the importance of francophone institutions, as opposed to bilingual institutions, the Commission had "failed to comply with one of the fundamental organizing principles underlying the Constitution, namely that of the protection of minorities."⁶⁹¹ On appeal, the Government of Ontario contested the reference to unwritten constitutional principles, arguing that equality rights are limited to enumerated or analogous grounds. However, the court of appeal rejected this and affirmed the ruling of the divisional Court. Because the issue was "constitutional", Sharpe J.A. stated that the appropriate standard of review was appropriateness.⁶⁹² Moreover, because the decision to close the hospital could not survive the most deferential standard of review – patent unreasonableness – that detailed consideration of the appropriate standard was not necessary.⁶⁹³

In *Baie d'Urfé v. Quebec (Attorney General)*,⁶⁹⁴ the Quebec Court of Appeal (Gendreau, Baudouin and Forget JJ.) rejected the argument that unwritten constitutional principles can constrain Parliament and the legislatures. The Court stated that unwritten or structural principles can only be used to fill legislative and constitutional void; they cannot be used to contradict what is expressly contained in the text of either instrument. In its words: "la

⁶⁹¹ (1999), 181 D.L.R. (4th) 263 (Ont. Div. Ct.) at 41.

⁶⁹² *Lalonde*, *supra* note 690 at 567-68.

⁶⁹³ *Ibid.*

⁶⁹⁴ *Baie d'Urfé v. Quebec (A.G.)*, [2001] R.J.Q. 2520 (C.A.), leave to appeal to S.C.C. refused, [2001] 3 S.C.R. xi [*Baie d'Urfé*].

jurisprudence de la Cour suprême est claire: ces principes non écrits ne peuvent pas être opposés à un texte constitutionnel écrit pour le contredire ou le vider complètement de sa substance”.⁶⁹⁵ This therefore confirmed the distinction made in first instance before Lagacé J. of the Quebec Superior Court, that although unwritten constitutional principles had been relied upon in *Montfort*, they were directed at an administrative decision, not at an Act of the Legislature.⁶⁹⁶

Conclusion

First, the autonomy of the *Charter* as cause of action is difficult to reconcile with the evolving notion of “cause of action” in public law, which has shifted from a theoretical definition to one of cause of action in fact. Nevertheless, the autonomy of the *Charter* as cause of action has important procedural implications for the plaintiff, who is required to notify the attorney general when raising constitutional issues. Such procedural requirements vary from jurisdiction to jurisdiction and thus reflect the uncertain theoretical foundation to the autonomous nature of the *Charter* as cause of action. In addition, while notice requirements have generally purported to protect the public interest, such a justification cannot be used in the case of secondary legislation and administrative decisions because the legal effect of an invalid regulation will not vary according to the nature of grounds of review. Thus, notice requirements reflect the relative uncertainty caused by the introduction of the *Charter* and the need for legislative reassurance of a balanced argument.

Second, while review under the *Charter* is said to be exercised on a standard of correctness, this has not always been the case because the sole invocation of the *Charter* should not alter the standard of review. In addition, the autonomy of constitutional and

⁶⁹⁵ *Ibid.* at 2537. Other courts have equally followed this principle. See *Singh v. Canada (A.G.)*, [1999] 4 F.C. 583 (T.D.), aff’d [2000] 3 F.C. 185 (C.A.), leave to appeal to S.C.C. refused, [2000] 1 S.C.R. xx; *Bacon v. Saskatchewan Crop Insurance* (1999), 65 C.R.R. (2d) 170 (Sask. C.A.), leave to appeal to S.C.C. refused, [2000] 1 S.C.R. vi.

⁶⁹⁶ *Lalonde*, *supra* note 690.

administrative law standards of review is difficult to reconcile with the very notion of “standard of review” which purports to ensure judicial consistency in the review of administrative action. Nevertheless, review under the *Charter* has emerged so as to provide a distinct standard of review, which in contrast to traditional administrative law standards of review, operate dynamically, by evolving with the argument of the parties. The distinction between administrative and constitutional standards of review, and even the standard of review available under “unwritten constitutional principles” is difficult to accept because all are based on constitutional considerations.

CHAPTER 7 – NECESSITY OF RAISING CONSTITUTIONAL ARGUMENT

As the process by which courts determine their intensity of scrutiny, the articulation of a standard of review in Canadian public law illustrates a fundamental contradiction. On the one hand, according to the alternative grounds doctrine, “a case that is properly before a court may be capable of decision on a non-constitutional ground or a constitutional ground or both. The course of judicial restraint is to decide the case on non-constitutional grounds. That way, the dispute between the litigants is resolved, but the impact of a constitutional decision on the powers of the legislative or executive branches of government is avoided.”⁶⁹⁷

This doctrine can be likened to its American counterpart: the doctrine of avoidance of unnecessary constitutional pronouncements.⁶⁹⁸ The avoidance doctrine has traditionally been understood as implying that judges should not decide the constitutionality of a statute if this would be politically inappropriate. In response, avoidance has been criticized. Some have argued that the avoidance doctrine should not apply when fundamental values are at stake.⁶⁹⁹ Similarly, K. Roach criticizes the practice of limiting or avoiding constitutional adjudication, which he portrays as cowardly.⁷⁰⁰ He also equates this with denying constitutional rights: “The Court must simply decide

⁶⁹⁷ Hogg, *Constitutional Law*, *supra* note 9 at 56-18. Mootness, abstract questions and alternative grounds have traditionally been grouped as means of “deciding whether to decide”. See R.J. Sharpe, “Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide” in Sharpe, *Charter Litigation*, *supra* note 3, 327. However, the alternative grounds doctrine can be distinguished because it does not concern itself with the existence of a dispute but rather the means of resolving it.

⁶⁹⁸ Developed by J. Marshall in 1833, the “avoidance doctrine” or “last resort rule” is based on the credibility of federal courts, the final and delicate nature of judicial review, and the paramount importance of constitutional adjudication. See *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.D.D. Va. 1833); L. Kloppenburg “Avoiding Constitutional Questions” (1994) 35 B.C.L. Rev. 1003; “Supreme Court Interpretation of Statutes in order to Avoid Constitutional Questions”, Note (1953) 53 Colum. L. Rev. 633; H.H. Wellington, “*Machinists v. Street*: Statutory Interpretation and the Avoidance of Constitutional Issues” [1961] Sup. Ct. Rev. 49.

⁶⁹⁹ See M. Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Edmond-Montgomery: Toronto, 1983) at 99.

⁷⁰⁰ *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* (Toronto: Irwin Law, 2001) at 208.

constitutional issues, however difficult or divisive they may be (...) ducking the issue will only delay the inevitable and often constitute an implicit and unjustified dismissal of the merits of the claim.”⁷⁰¹

However, these criticisms ignore the role of avoidance in the protection of fundamental rights. If an administrative authority has acted under a valid statute in a manner nevertheless contrary to the *Charter*, judges may treat the matter as one of administrative law, thereby avoiding a full-blown constitutional dispute. The spirit of the avoidance doctrine was also captured by Georg Jellinek, the great German constitutional scholar, who warned jurists early last century about “killing sparrows with cannons”. Indeed, raising constitutional arguments can often lead to a polarization of debate, and in any case, broad constitutional rights cannot be claimed in the abstract but must necessarily be supported by principles adapted to each individual situation. Avoiding constitutional issues in such cases is advantageous for the plaintiff since the burden of demonstrating that a statute is unconstitutional as applied, or that a statute was correctly applied, but that it is simply unconstitutional and needs to be “read in”, will undoubtedly be greater than demonstrating that the statute was simply misinterpreted by the public authority.

In contrast to the avoidance doctrine, the law also promotes the constitutionalisation of disputes by providing that constitutional issues will be assessed according to the most exacting standard of review – that of correctness.⁷⁰² As a result, as noted by H. Arthurs, Canadians often use the adjective “constitutional” to legitimize legal arguments.⁷⁰³ Indeed, because administrative law standards of review have varied between patent unreasonableness, reasonableness and correctness, it is undoubtedly advantageous to treat the exercise of administrative discretion as a constitutional question requiring greater scrutiny. It is therefore not surprising that the alternative grounds doctrine has not been successful and has not been applied consistently.⁷⁰⁴ Thus, the doctrine will only apply if both constitutional and non-constitutional grounds are actually invoked and if they are of

⁷⁰¹ *Ibid.* at 210.

⁷⁰² See *supra* note 629.

⁷⁰³ Arthurs, “Constitutional Courage”, *supra* note 373.

⁷⁰⁴ See Hogg, *Constitutional Law*, *supra* note 9 at 58-16; Sossin, *supra* note 525 at 77.

equal remedial effect. As a result, nothing has prevented parties from litigating their rights alternatively as a dispute of constitutional nature, e.g., on the one hand by claiming a remedy under s. 24(1) or treating the matter as one of “constitutional applicability”, or on the other hand, as one of common law nature. This only confirms the general view that the common law has never placed any order of preference on arguments made by parties, and in contrast to inquisitorial models, provides parties with greater control over the process of litigation.

The alternative grounds doctrine is not without recalling authors such as A. Bickell who sought to limit constitutionalism by advocating judicial restraint.⁷⁰⁵ However, it is not clear whether Bickell viewed constitutional and common law remedies as alternative causes of action or part of a continuum. In other words, did Bickell advocate restraint in deciding constitutional issues altogether, or in deciding issues constitutionally when they could be litigated otherwise? Thus, it is open to question whether judicial restraint is antinomical with the protection of constitutional rights. Indeed, J. Evans argued that the *Charter* should not be directly relevant to the control of discretionary power by emphasising the continuity of the *Charter* with the common law. He states: “It should only be necessary to resort directly to the *Charter* when a ground of judicial review that would otherwise have been available at common law has clearly been abrogated by statute, or when the existing common law of judicial review does not give to a *Charter* right the degree of protection that the applicant is seeking.”⁷⁰⁶ However, this interpretation of the alternative grounds doctrine expresses only one of its variants because it implies that the *Charter* has had no impact on the common law, and thus, its principles would not have evolved under the *Charter*.⁷⁰⁷

Thus, while it has been established that in case of ambiguity, the *Charter* may be used as an interpretative guide,⁷⁰⁸ the *Charter* has only been used as an interpretative guide when

⁷⁰⁵ “The Passive Virtues” in A. M. Bickell, in *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, Conn.: Yale University Press, 1962) at 111.

⁷⁰⁶ Evans, “Principles”, *supra* note 17 at 57.

⁷⁰⁷ Compare the minority opinion in *Blencoe*, *supra* note 159.

⁷⁰⁸ *Symes v. Canada (A.G.)*, [1993] 4 R.C.S. 695 [Symes]; *Bell ExpressVu Limited Partnership v. R.*, [2002] 2 S.C.R. 559 [Bell ExpressVu].

explicitly pleaded by parties. As such, the *Charter* has generally been treated as a special remedy, offering “free-standing”⁷⁰⁹ legal obligations, as opposed to interpretative constructs that must necessarily be resorted to in the interpretative process. However, Courts, in exercising both judicial restraint and greater comfort with *Charter* principles, have increasingly used the *Charter* as an interpretative guide rather than a separate remedy. Thus, Evans concludes, “The modes of reasoning and expression developed in *Charter* cases are likely to drive reviewing courts to consider constitutional fundamentals raised by the law of judicial review of administrative action in cases where the *Charter* is not directly relevant, and to frame their judgements accordingly.”⁷¹⁰ These predictions have been confirmed by Iacobucci J. In noting the importance of legislative facts, theory, academic perspectives and international jurisprudence in *Charter* litigation, Iacobucci recognizes an “increased willingness of courts to consider such factors outside of the context of *Charter* litigation as well. As the judiciary has become increasingly comfortable with considering such material, it has begun to incorporate it into its work generally. This has been done not with a view to make a “constitutional” case out of every dispute but rather to analyse and resolve the dispute with more substantive technique to reach a sounder result.”⁷¹¹

These views illustrate a general trend in the judicial review of administrative action: constitutional claims against government – i.e. claims of remedy under s. 24(1) of the *Charter* – can increasingly be litigated as issues of statutory interpretations. Thus, the *Charter* is being taken as a necessary given – a legal constant – in the control of administrative discretion insofar as it does not necessarily need to be raised in order to inform the interpretation of discretionary delegations of power.

⁷⁰⁹ Expression used by M. Elliot, *The Constitutional Foundations of Judicial Review* (Oxford: Hart, 2001) at 241.

⁷¹⁰ *Ibid.* at 92.

⁷¹¹ F. Iacobucci, “The *Charter*: Twenty Years Later” in *The Canadian Charter of Rights and Freedoms - Reflections on the Charter after Twenty Years*, J.E. Magnet et al. eds. (LexisNexis Butterworths: Markham, Ont., 2003) 381 at 397.

A. NECESSITY OF ATTACKING STATUTORY CONFERRALS OF DISCRETION: THE PROBLEM OF OVERBREADTH AND VAGUENESS

The conferral of administrative discretion represents the dilemma faced by legislators: “to draft with narrow particularity is to risk nullification by easy evasion of the legislative purpose; to draft with great generality is to risk ensnarement of the innocent in a net designed for others”.⁷¹² The general consequence of this phenomenon is that statutes are generally endowed with potentially wider applications than they need to have. The danger is that statutes may apply too widely to be considered constitutional – the question of overbreadth – or they may be so general that they are devoid of any specific application, concrete objective or intelligible standard, in which case they will be unconstitutional for vagueness.

The doctrines of overbreadth and vagueness are relevant in understanding the limits between constitutional and administrative law because not all conferrals of discretion are unconstitutional; conversely the conferral of discretion, as simply a delegation of power to choose, should not immunize the exercise of decision-making power. However, because legislation is not presumed constitutional as far as the *Charter* is concerned, the validity of many, if not all statutory conferrals of administrative discretion is brought into question because they can be interpreted in a manner that is unconstitutional. Thus, it is difficult to accept its full-fledged rejection because all statutory conferrals of discretion can be interpreted unconstitutionally, which nevertheless should not render them automatically invalid.

In order to avoid this, courts have developed the theories of “overbreadth and vagueness”, which purport to determine the standard according to which statutory conferrals of discretion are held to be valid. The problem arises when the expression “prescribed by law” has been understood as an independent doctrine and synonymous

⁷¹² L.H. Tribe, *American Constitutional Law*, 2nd ed. (Mineola, N.Y.: Foundations Press, 1988) at 1033 [Tribe, *American Constitutional Law* 1988].

with defining the amount of detail that a statute must carry. A second solution has been the recognition of a “limited” presumption of constitutionality. Having recognised that all statutory conferral of discretion cannot be declared unconstitutional, courts have recognised a presumption of constitutionality, except in cases where legislation intended otherwise: thus, a “limited” presumption of constitutionality. This position holds that Parliament and legislators may wish to limit rights and thus that limitations of rights may exceptionally be made if Parliament and the legislatures so provide. However, as will be seen, this solution is not entirely satisfactory insofar as it views the Charter as a statutory remedy that can be violated by Parliament and legislatures, thereby confusing “violations of the Charter” with reasonable limitations of *Charter* rights.

1. Overbreadth and Vagueness as Independent Legal Doctrines

The doctrines of overbreadth and vagueness are generally based on s. 1 of the *Charter*, which provides that the rights contained therein are subject to reasonable limits “prescribed by law”. Thus, legislation must be drafted with sufficient precision so as to ensure the adequate protection of s. 7 and s. 1.⁷¹³ Thus, fundamental justice requires a coherent basis for judicial interpretation and legal certainty. Moreover, reasonable limitations prescribed by law must constitute minimal impairments on fundamental rights. However, while the notions of overbreadth and vagueness have sought to identify the amount of detail contained in a statute as independent grounds of unconstitutionality, the standard of intelligibility required by these doctrines has never been clear.

⁷¹³ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 [*Nova Scotia Pharmaceutical*]; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 103.

a) Inscrutability of Overbreadth and Vagueness

The European Court of Human Rights decision *Sunday Times v. United Kingdom Government* defined the expression “prescribed by law” occurring in the *European Convention on Human Rights* as having two conditions.⁷¹⁴ First, the norm under scrutiny must be accessible and ascertainable to the public. Second, it must be formulated with sufficient precision. In doing so, it ruled that the common law qualifies as “law” for the purposes of the expression “prescribed by law” appearing in the *European Convention of Human Rights*. However, there is no direct answer to determine the amount of detail a statute must contain. Thus, vagueness and overbreadth have never provided any answer, nor even come close to justifying themselves as independent doctrines. As Bickell noted: “vagueness is vague”, it has many meanings and serves many more purposes than one end.⁷¹⁵

At the outset, vague legislation has never of itself been an immediate source of unconstitutionality. For instance, the mere existence of a statutory discretion has never justified the invalidation of a statute, although it has always required that the powers thereunder be exercised in accordance with the Constitution. This observation is particularly relevant in the wake of *Baker v. Canada*, where the Supreme Court recognised that discretion is not an exception to the rule but that all legislative delegations of power confer varying degrees discretionary powers.⁷¹⁶ The limiting factor as to the validity of the statute is therefore not the existence of discretion but whether it is capable of sustaining a greater number of valid interpretations than invalid interpretations.

⁷¹⁴ (1979), 2 E.H.R.R. 245 at 271 (Eur. Ct of H. R.) [*Sunday Times*].

⁷¹⁵ Bickell, *infra* note 705 at 149, referring to A. G. Amsterdam, “The Void for Vagueness Doctrine in the Supreme Court” (1960) 109 U. Pa. L. Rev. 67. Hogg also says that “intelligible standard” criterion for vagueness cannot be determined. See Hogg, *Constitutional Law*, *supra* note 9 at 37.5(c). However, some authors have argued that there are two doctrines of overbreadth and vagueness, such that legislative vagueness is more demanding than regulatory vagueness. See G. Pépin, “La nullité des lois et des règlements pour cause d'imprécision: une norme unique ou deux normes distinctes de contrôle?” (1996) 56 Rev. d. Bar. 643.

⁷¹⁶ *Baker*, *supra* note 169.

For example, in *R. v. Jones*, a statute provided ministerial discretion for the purposes of allowing parents to educate their children at home.⁷¹⁷ The applicant argued that leaving such a discretionary power to a governmental official was a violation of religious freedom, which implied the free choice of schooling as a matter of right. LaForest J. rejected the argument, stating that statutory discretion is a necessary element of government and the statutory scheme was accordingly validated. Another example is *Eldridge v. British Columbia (A.G.)*.⁷¹⁸ In this case, the applicants had been denied the services of a sign language interpreter for the purposes of medical diagnosis. The denial of such a service was all the more surprising given that the legislation in question provided for “comprehensive health care” to all those who qualified. The hospital argued that the legislation in question did not provide for such services and it was therefore not obliged to provide them. The Supreme Court nevertheless did not hold the legislation unconstitutional, but rather the action taken by the hospital. In doing so, it stated:

“Some grants of discretion will necessarily infringe *Charter* rights notwithstanding that they do not expressly authorize the result (...) In such cases, it will generally be the statute, and not its application, that attracts *Charter* scrutiny (...) In the present case, however, the discretion accorded to the Medical Services Commission to determine whether a service qualifies as a benefit does not necessarily or typically threaten the equality rights set out in section 15(1) of the *Charter*.”⁷¹⁹

Similarly, even in situations where legislation is unquestionably wide, it has been upheld by distinguishing between the “actions” of governmental officials and the legislation itself. In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, customs officials acting under the *Customs Act* repeatedly seized materials imported by the Emporium (homosexual bondage and domination) deemed obscene under the *Criminal Code*.⁷²⁰ The majority ruled that the rights of the applicant had been violated but that the source of the violation was not the legislation but the actions of the Customs officers. The minority, on the other hand, held that the legislation as well as the actions of the customs officials had been the source of the violation. It held that the legislation in question

⁷¹⁷ [1986] 2 S.C.R. 284.

⁷¹⁸ *Eldridge supra* note 153.

⁷¹⁹ *Ibid* at 651.

⁷²⁰ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1 120 [*Little Sisters*]

provided “absolute discretion” to the customs officials and therefore was unconstitutional.

In *Irwin Toy v. Quebec*, the Court stated that the very existence of a delegation of discretionary powers did not imply a violation of the requirement that limitations of *Charter* rights be “prescribed by law”;⁷²¹ the limiting factor being that the legislation provided an “intelligible standard” according to which limitations could be assessed.⁷²² As Dickson CJ. stated:

“Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no “limit prescribed by law”.

In this case, the Court ruled that legislation purporting to ban certain types of advertising for children was valid because it required the weighing of three factors in the decision-making process. Moreover, the Court noted that the Office de la Protection du Consommateur had passed a series of guidelines, to conclude that “One cannot infer from the existence of the guidelines that the courts have no intelligible standard to apply.”⁷²³

b) Dangers of an Independent Doctrine of Overbreadth and Vagueness

The doctrines of overbreadth and vagueness have not attracted much academic approval. S. Beaulac argues that the doctrine of overbreadth and vagueness should distinguish

⁷²¹ [1989] 1 S.C.R. 927 [*Irwin Toy*]. *Slaight*, *supra* note 273.

⁷²² *Irwin Toy* at 983.

⁷²³ *Ibid.*

between overbreadth and vagueness under ss. 7 and 14 and s. 1, according to which there will be overbreadth and vagueness in the abstract sense (ss. 7 and 14) and the determination of whether collective interests justify legislative flexibility.⁷²⁴ G. Pépin argues in favour of two distinct standards of overbreadth and vagueness: one at common law, the other under the *Charter* such that legislative vagueness would be more demanding than regulatory vagueness, which he states has long been part of the law.⁷²⁵

However, there is much authority to the contrary. L'Heureux-Dubé stated in *Committee for Commonwealth v. Canada* that legislative precision has never been part of Canadian law.⁷²⁶ Moreover, authors have generally agreed that legislation is not void for vagueness simply because it is open to several possible interpretations. P. Garant, argues that overbreadth and vagueness may be factors of legal uncertainty because there is no way of determining the amount of detail.⁷²⁷ The relative ease with which litigants can allege that a law is unconstitutionally vague has prompted some judges to warn that vagueness should not be seen everywhere.⁷²⁸ Thus the remedy may be greater than the problem. As a solution, Garant states that in order to reduce the number disputes about what is an “intelligible standard”, the doctrines of overbreadth and vagueness under s. 7 should not apply to economic rights. Similarly, L. Huppé, questions the necessity of the doctrines of “overbreadth and vagueness”, argues that precision should not determine whether a statute is law.⁷²⁹ He argues that one cannot compare a statute with the *Charter*, concluding that certain behavior is not “prescribed by law”. Huppé states that vagueness is not the cause for striking down laws that are not “prescribed by law”, but that such laws conflict with the violation of s. 7.⁷³⁰ Thus, if the law does not infringe any substantive rights, there is no constitutional principle that it abide by a standard of

⁷²⁴ S. Beaulac, “Les bases constitutionnelles de la théorie de l'imprécision: partie d'une précaire dynamique globale de la Charte” (1995) 55 R. du B. 257.

⁷²⁵ G. Pépin, “La nullité des lois et des règlements pour cause d'imprécision: une norme unique ou deux normes distinctes de contrôle?” (1996) 56 R. du B. 643.

⁷²⁶ *Committee for Commonwealth*, at 210.

⁷²⁷ “L'imprécision en droit administratif et en droit constitutionnel: un défi à l'intelligence moyenne” (1994) 4 N.J.C.L. 75.

⁷²⁸ *Béliveau c. Comité de discipline (Barreau du Québec)*, [1992] R.J.Q. 1822, (C.A.), leave to appeal to S.C.C. denied: [1993] 1 S.C.R. v.

⁷²⁹ “La fonction des lois et la théorie de l'imprécision” (1992) R. du B. 831 at 832.

⁷³⁰ *Ibid.* at 832.

precision.⁷³¹ Ribeiro has gone further by arguing that overbreadth and vagueness are not independent legal doctrines but only apply where there has been a violation of a specific right.⁷³² Thus, while he shows how the Supreme Court has entertained argument regarding overbreadth and vagueness independently of the demonstration of any substantive violation, independent claims of vagueness and overbreadth have never succeeded.

These latter opinions appear to be confirmed by a closer examination of the law. Thus, in examining legislation that was struck down for vagueness and overbreadth, it is impossible to determine what amount of detail was necessary independently of the addressing the compatibility between the legislation and a specific *Charter* right. In many cases where legislation has been struck down for vagueness, this has been related to two factors: first, that the legislation violated a specific right under the *Charter*; second, that the number of possible unconstitutional interpretations of the statute outnumber its constitutional interpretations. Indeed, allowing legislation to be struck down because of lack of detail has led to precarious reasoning and highly questionable solutions.

First, in some cases, statutes have been struck down for lack of detail, but such outcomes should be interpreted as implying the violation of a specific right and that its unconstitutional interpretations outnumber those constitutional. For instance, in *R. v. Nova Scotia Pharmaceutical Society*, a case concerning fundamental justice under s. 7, the court held that providing for pre-trial detention “in the public interest” was unconstitutionally vague,⁷³³ while in *R. v. Morales*, “public safety” was not.⁷³⁴ In *R. v. Morgentaler*, therapeutic abortion committee provisions of the *Criminal Code* were held to violate s. 7 of the *Charter* because they provided too little guidance on the procedures to be followed and standards to be applied by these committees in deciding on the

⁷³¹ *Ibid.*

⁷³² “Le problème constitutionnel de l'imprécision des lois” (1998) 32 R.J.T. 663 at 687.

⁷³³ *Nova Scotia Pharmaceutical*, *supra* note 713.

⁷³⁴ [1992] 3 S.C.R. 711.

opportunity of providing an abortion.⁷³⁵ This was held to leave too much room for the violation of a pregnant woman's right to "life liberty and security of the person".

In addition, legislation lacking a clear statutory objective has been struck down only because it violated specific *Charter* rights. For instance, in *Re Ontario Film and Video Appreciation Society*,⁷³⁶ the Ontario Court of Appeal ruled: "It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law." This case concerned whether action taken pursuant to a statute authorizing film censorship was constitutional. The applicants applied for review of a decision given by the Board of Censors concerning the censorship of certain films, and had succeeded before the Divisional Court. The difficulty arose not because the statute authorized censorship, but because it did not specify under which circumstances censorship could take place. Nevertheless, the Board had developed its own criteria, pursuant to its regulatory power authorized by the statute, and had made these publicly available. This solution should therefore not be interpreted as a lack of detail, but that of a lack of objective and the ensuing violation of freedom of expression.

Second, there are instances where the search for detail has led to the invalidation of legislative schemes which should have been upheld. This was the case in *Wilson v. Medical Services Commission of British Columbia*, where the Supreme Court of British Columbia ruled that the *Medical Service Amendment Act* and its regulations placing geographic restrictions for the issuance of billing numbers to new doctors and those coming from outside the province violated principles of fundamental justice.⁷³⁷ The Court found that by restricting the practice of medicine, the *Act* violated s. 7 of the *Charter* because it did not specify the procedural rights of applicants. The province countered that whatever deficiencies the scheme displayed, they could be rectified by interpreting the *Act* in accordance with common law principles of natural justice, and in any event that

⁷³⁵ [1988] 1 S.C.R. 30.

⁷³⁶ (1984), 45 O.R. (2d) 80 (C.A.) [*Ontario Film and Video*].

⁷³⁷ (1988), 53 D.L.R. (4th) 171 (B.C.C.A.), leave to appeal to S.C.C. refused, [1988] 2 S.C.R. viii.

applicants could apply to have the Commission's decision reviewed. Nevertheless, the court rejected these arguments, holding that the *Act* produced unconstitutional effects and provided "areas of uncontrolled discretion, left substantial scope for arbitrary conduct". Accordingly, the Court held that the *Act* was "so procedurally flawed" that it could not stand.

From a procedural point of view, it is difficult to see why the *Act* was flawed. The court listed many provisions that the *Act* did not provide *inter alia*, a "duty to decide", means for applicants of knowing where their services might be required, and whether their application was being considered. These considerations seem superficial and it is difficult to understand why they should offend principles of fundamental justice, especially when these details can be determined by regulations. Indeed, this decision combines two weak arguments – vagueness and restrictions on economic liberty – as bases for holding a law unconstitutional. Hogg argues that s.7 should not apply to economic rights,⁷³⁸ although this is not convincing because s. 7 does not draw any distinctions between economic and political liberty. Moreover, to argue that s. 7 does not apply to economic rights would open the door to the possibility that s. 7 does not protect economic rights to the administrative process. Arguably, the problem arises from the development of vagueness and overbreadth as independent legal doctrines seeking to determine the amount of detail statutes must contain. As such, *Wilson* illustrates that an independent doctrine of vagueness can lead to dangerous results.

2. Evolution of the Presumption of Constitutionality

In order to avoid striking down statutes that confer administrative discretion, the Supreme Court has developed a "limited" presumption of constitutionality. In *Slaight*

⁷³⁸ Hogg, *Constitutional Law*, *supra* note 9 at 44.7(c).

Communications v Davidson,⁷³⁹ a founding case on the relation between the *Charter* and administrative law, Lamer J. stated:

“Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force and effect. ... It must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication.”⁷⁴⁰

The recognition a limited presumption of constitutionality can be seen as a means of protecting statutory conferrals of discretion, where these do not infringe the *Charter* expressly or by necessary implication. However, as will be seen, such recognition confuses the violation of the *Charter*, the violation of *Charter* rights, and their reasonable limitation.

a) Recognition of a Limited Presumption of Constitutionality

In contrast with the initial interpretation of the presumption of constitutionality, the purpose of the presumption is now generally to favor individuals, and exceptionally to favor Parliament and legislatures if they express such an intent. This was confirmed in *Bell ExpressVu* where Iacobucci J., speaking for the Court, ruled “that a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction.”⁷⁴¹ These views are based on the idea that Parliament and the legislatures may violate the *Charter*, if they express such intent. They illustrates a tripartite classification of legislation: (1) that which reflects the *Charter*; (2) that which runs contrary to it and

⁷³⁹ *Slaight*, *supra* note 273.

⁷⁴⁰ *Ibid.* at 1079 (emphasis added). Similar statements can be found in *Hills v. Canada (A. G.)*, [1988] 1 S.C.R. 513 and more recently in *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at 275: “Where a statute is open to more than one interpretation, one of which is constitutional and the other of which is not, the interpretation which is consistent with the Constitution should be adopted.”

⁷⁴¹ *Bell ExpressVu*, *supra* note 708.

therefore is unconstitutional; (3) that which neither reflects the *Charter*, nor contradicts it but nevertheless “infringes” or “violates” *Charter* rights. For instance, Sullivan argues:

“even though an interpretation that complies with constitutional values may be preferable, the courts cannot adopt it in the face of cogent evidence of contrary intent. (...) It is important to appreciate that *Charter* values, though heavily weighted, are not the only values worthy of pursuit.”⁷⁴²

This opinion hinges on the possibility that Parliament or a legislature has the power to infringe or violate certain *Charter* rights:

“The *Charter* itself contemplates that legislatures may wish to limit its protections in an effort to promote some other social good. This possibility should not be precluded by interpretation. Where an interpretation violates the *Charter*, if it appears to be the most appropriate interpretation having regard to its plausibility, efficacy and acceptability, the courts must adopt it and then go on to consider whether the violation is justifiable under s. 1.”⁷⁴³

This third category of laws reflects the duality of *Charter* litigation, namely the distinction between the burden of proof of the plaintiff – proof of violation, and the burden of the government – either countering the existence of a violation or alternatively demonstrating proof of justification under s. 1. This distinction purports to reinforce that the burden of proof for justification lies with the government, not the plaintiff. At the outset, this is questionable because it is the substantive rules that define the content of a right rather than the balance between the burden of proof of the plaintiff and government that determine the success of a claim. Nevertheless, the tests of “violation” and “justification” have evolved separately such that it is common to speak of “justified violations”, as opposed to saying that the claim did not succeed. Arguably, the distinction between violation and justification reflects the dichotomy between grounds of review and standards of review exercised by the courts. In cases where a law “justifiably infringes” a *Charter* right, the intensity of review will be stronger because such areas demand greater

⁷⁴² R. Sullivan, *Statutory Interpretation* (Toronto: Irwin Law, 1996) at 176. For a similar position, see P.-A. Côté, *The Interpretation of Legislation in Canada*, (Toronto: Carswell, 2000) at 370.

⁷⁴³ Sullivan and Driedger, *supra* note 302 at 325.

judicial scrutiny. Conversely, in areas where there has been “no violation”, this implies that judicial scrutiny is very low because it was not necessary to look any further.

Indeed, s. 1 of the *Charter* only guarantees rights subject to “reasonable limits”, and because no right should be absolute, it is difficult to view the limitation of rights as an exception to the rule. Thus, the “limited” presumption reflects the resulting confusion between “violations of *Charter*” rights and “reasonable limitations” thereto. By holding “no limitations” of rights as the rule and “limitations of rights” as the exception, the “limited” presumption of constitutionality ultimately implies viewing the *Charter* as a mere statutory bill of rights that can be “violated” by later legislation, and this even without invoking the notwithstanding clause.

b) Distinguishing Reasonable Limitations from Infringements of *Charter* Rights

While the content of *Charter* rights has sought to reflect the structure of *Charter* litigation, infringements and justifications are nevertheless two sides of the same coin because individuals cannot claim *Charter* rights in the abstract, and all rights claimed by individuals must be susceptible of limitation. Thus, only generalisable claims can be reasonable. This point can be illustrated by L.L. Fuller’s distinction between “naked demands of right” and “claims of right”, the latter being distinguished because they are supported by a principle.⁷⁴⁴ This is also reflected in a statement by Lamer C.J.: “The *Charter* does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁷⁴⁵

Thus, determining whether a *Charter* right has been infringed is not a conclusive determination made upon presentation of *prima facie* evidence by the plaintiff; rather, it

⁷⁴⁴ Fuller, *supra* note 222.

⁷⁴⁵ *Slaight*, *supra* note 273 at 1079. See also Monahan, *Politics*, *supra* note 3 at 177.

is the result of a failed rebuttal by government. Conversely, a governmental rebuttal of proof of a *prima facie* violation of rights, or by argument that the law constitutes a justified infringement, if successful, implies that no *Charter* right has been infringed. Indeed, a law that “justifiably infringes” *Charter* rights is no different from one that does not infringe *Charter* rights because both are valid exercises of legislative power. While it is fair to state that the degree of judicial scrutiny should vary according to the limitations imposed upon individual rights, stating that a violation or an infringement of a “*Charter* right” or, even worse, “of the *Charter*” can be justified does not promote the protection of individual rights because the respective burdens of proof in *Charter* litigation do not require the demonstration of a violation of the *Charter*, nor even the demonstration of the violation of a *Charter* right but merely *prima facie* evidence thereof. Conversely, the government must demonstrate not the justification of the violation (it has not yet been established) but that such a *prima facie* violation has not taken place, or in other words that the *prima facie* violation is but a reasonable limitation.⁷⁴⁶

Indeed, the theory of justified infringements postulates that Parliament and the legislatures can exceptionally alternatively use s. 1 or s. 33(1) to authorize the infringement of the *Charter*. On this, there is even wide academic approval.⁷⁴⁷ Not only does the category of laws that “justifiably infringe” or “justifiably violate” the *Charter* contradict s. 24(1) which provides a remedy for every “infringement” of a *Charter* right, but it also reflects the old rule that subordinate legislation can exceptionally overrule a statute where this has been so authorized.⁷⁴⁸ However, primary legislation, s. 33(1) set aside, cannot, properly speaking, “infringe” nor authorize the “infringement” of the *Charter*; it can only provide reasonable limits, which for the purposes of the *Charter*, are not “infringements”. This clearly distinguishes the *Charter* from other statutory remedies

⁷⁴⁶ This author therefore cannot agree with the assertion that “The second stage of *Charter* review, which is reached only if a *Charter* right has been infringed, is the inquiry into justification under s. 1.” See Hogg, *Constitutional Law*, *supra* note 9 at 35.4.

⁷⁴⁷ Hogg states: “It should be remembered that s. 1 is not the only route to the enactment of laws in derogation of *Charter* rights. Under s. 33 (the override clause), it is possible to enact a law that overrides a *Charter* right by including in the law a notwithstanding clause”, Hogg, *Constitutional Law*, *supra* note 9 at 35.1. Compare s. 24(1) of the *Charter*, *supra* note 1, which states: “Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been *infringed* or *denied* may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” [emphasis added].

⁷⁴⁸ *Re George Edwin Gray* (1918), 57 S.C.R. 150.

which undoubtedly limit legislative power, although because they are not entrenched, enable Parliament and legislatures to permanently curtail their effects.⁷⁴⁹ Such instruments are different from the *Charter* which enables Parliament and the legislatures to establish laws contrary to the *Charter*, only regarding specific rights and for renewable periods of five years (s. 33). In contrast, legislation that is contrary to the *Bill of Rights* may nullify the *Bill's* effects, although some argue that, at most, the *Bill* binds Parliament regarding subsequent legislation not enacted “in manner and form”.⁷⁵⁰

Indeed, stating that Parliament and the legislatures, the notwithstanding clause set aside, may sometimes comply with the *Charter* and sometimes not, because they are pursuing contrary objectives, amounts to viewing the *Charter* as a mere statutory bill of rights that may be set aside by “the later in time” rule, or at least with a clause as that required by s. 2 of the *Canadian Bill of Rights*.⁷⁵¹ Needless to say, the *Charter* is entrenched and cannot freely be violated by any branch of government. The legislative branch cannot lawfully infringe or violate the *Charter* by “implicit intent” or even “necessary implication”. The only means of doing so is by invoking s. 33(1). However, this provision must expressly be invoked; it is not automatic nor general since it operates only with regard to specific pieces of legislation and for limited periods of time. The proper functioning of s. 33(1) requires that Parliament and legislatures comply with the *Charter*.

The confusion between violations and infringements of rights on the one hand, and limitations of rights on the other, cannot be tolerated since it leads to the proposition that certain laws that violate the *Charter* constitute a valid exercise of legislative power. Where they exist, such laws are incompatible with the Constitution of Canada and should

⁷⁴⁹ For instance, s. 2 of the *Bill of Rights* provides: “Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared ...” Because the *Bill* is not entrenched, Hogg argues that the *Canadian Bill of Rights* binds the Parliament in the future although not substantively, but it “in manner and form”, thereby requiring it to state whether legislation is enacted contrary to the *Bill*. Hogg, *Constitutional Law*, *supra* note 9, at 32.3(c).

⁷⁵⁰ Hogg, *Constitutional Law* at 32.4(c).

⁷⁵¹ *Supra* note 24, s. 2: “Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared ...”.

not be upheld, unless they benefit from s. 33(1) protection. There is no doubt that fundamental rights defined in the Constitution form part of the “core values” of Canadian society. Moreover, there are clearly others worthy of support. However, if there is a conflict between the two, in the sense that one violates (that is, it not only limits but causes infringements) it is the *Charter* that prevails. It therefore cannot be argued that the *Charter* should suffer from a weaker presumption of constitutionality than other parts of the Constitution because there are other values worthy of pursuit.

B. CONSTITUTIONALISATION OF ADMINISTRATIVE LAW STANDARDS OF REVIEW

As an expression of judicial restraint, the alternative grounds doctrine is related to s. 32(1) of the *Charter* provides that it applies, *inter alia*, “in respect of all matters within the authority” of the Parliament and the legislatures of each province.”⁷⁵² This phrase can be interpreted as giving priority to review on federalism grounds, and if the matter was “within the authority” of Parliament or the legislature.⁷⁵³ Thus, s. 32(1) is not exclusively concerned with defining institutional scope of the *Charter*, but also addressing its relationship with federalism. As the Ontario Court of Appeal stated in *McKinney v. Board of Governors of University of Guelph*:

(I)f the rights of a citizen have been adversely affected in a particular instance, recourse is first had to the relevant human rights legislation enacted at the appropriate constitutional level. Where the conduct complained of is sanctioned by that human rights legislation or any other legislation, resort is then had to the *Charter* to determine if the legislation in question is inconsistent with the *Charter*. If it is, it is the legislation that will be struck down to the extent of the inconsistency.⁷⁵⁴

⁷⁵² *Charter*, *supra* note 1, s. 32(1) [emphasis added].

⁷⁵³ See Hogg, *Constitutional Law*, *supra* note 9 at 15.2.

⁷⁵⁴ *McKinney CA*, *supra* note 506 at 208-9

The alternative grounds doctrine is also reflected in the competing interpretations of the remedial clause of the *Charter* – s. 24(1). This provision can be interpreted both as an autonomous judicial remedy but also as a general directive to courts. On the one hand, the original purpose of s. 24(1) was not to define a specific remedy but to provide a general directive to the courts. Before the *Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, Professor Tarnopolsky argued that the supremacy clause was insufficient to protect individuals against administrative acts. He therefore concluded that a remedy clause was necessary to make it “absolutely clear”⁷⁵⁵ that courts cannot limit themselves to striking down legislation. In this respect, Professor Tarnopolsky’s position advocated the clause as a general directive, not as a constitutive source of rights that would operate in parallel of other existing remedies. This is also confirmed that the *Charter* purports to provide a “baseline” for individual rights, as evidenced by s. 26.⁷⁵⁶ On the other, where s. 24(1) was interpreted as a specific remedy, the drafters were unclear as to how it would relate to the “general law”. Indeed, all drafts of s. 24(1) limit the relevance of s. 24(1) to instances “where no other remedy is available or provided by the law” or “where no other effective recourse or remedy exists”.⁷⁵⁷ However, these phrases were seen as a potential impediment to the full effect of the *Charter*, particularly when the other available remedy was not entirely appropriate.⁷⁵⁸

In addition, the interpretation of s. 24(1) as an alternate remedy is also reflected in the legal status of the presumption of constitutionality, which has implied a clear dividing line between constitutional and statutory interpretation. Although there are many advantages of treating the exercise of administrative discretion as a constitutional issue,

⁷⁵⁵ Testimony of Professor W. Tarnopolsky, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, 3rd Session of the 30th Parliament (Sept. 12, 1978) at 12:26.

⁷⁵⁶ *Charter*, *supra* note 1, s. 26 states: “The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.” See also *Continuing Committee of Ministers on the Constitution*, “Background Notes: Entrenching a *Charter* of Rights”, Document No. 830-81/026, 5th July 1980.

⁷⁵⁷ See Gibson, *General Principles*, *supra* note 8 at 192.

⁷⁵⁸ Having relinquished this phrase, Gibson argues that the relief available under s. 24(1) is independent of any other possible remedies, although the suitability of other remedies must be taken into account in deciding whether they are “appropriate and just”. *Ibid.* at 195.

there are also disadvantages of arguing such cases as constitutional matters (i.e. greater procedural costs) and limits as to what the Constitution can actually protect. Indeed, while the legal community has stressed the absence of a presumption of constitutionality under the *Charter*, this position has had the perverse effect of raising the burden of proof. Thus, in the absence of a presumption of constitutionality, or at least with a “limited” presumption of constitutionality, the Supreme Court has required individuals to raise constitutional issues to obtain redress for the violation of their rights, although where there are no doubts as to the validity of the statute in question. Nevertheless, the autonomy of constitutional and administrative law remedies is diminishing, thereby illustrating that their relationship is not static.

1. *Charter* as Autonomous Remedy

Initially, as a policy of ensure the utility of other statutory remedies, the Supreme Court treated *Charter* claims and other statutory remedies as cumulative. This was the case regarding the *Charter* and the *Canadian Bill of Rights*. Initially, the basis for granting remedies in the *Charter* was the substantive rights defined therein. However, courts have interpreted s. 24(1) as autonomous remedy that co-exist with those available at common law.

a) Cumulative Effect of *Charter* and other Statutory Remedies

In *Singh*,⁷⁵⁹ claimants to refugee status under the federal *Immigration Act* had not been granted a hearing to state their case. Such a right was not explicit in the *Act*; the applicants therefore applied to have the decision quashed and the *Act* declared unconstitutional, arguing that it was contrary to both the *Bill of Rights* and the *Charter*. The Supreme Court unanimously granted the remedy, although it was divided as to the basis for doing so. Wilson J., with the concurrence of Dickson C.J. and Lamer J., granted

⁷⁵⁹ *Singh*, *supra* note 455.

the remedy on the basis of s. 7 of the *Charter*. Beetz J., with the concurrence of Estey J. and MacIntyre J., believing that “life, liberty and security of the person” were not at stake, used s. 2(e) of the *Bill of Rights*, which grants a right to a fair hearing whenever a person’s “rights and obligations” are at stake. However, the division is not without its consequences for the legislation in question. If the provisions are found to contravene the *Charter*, it would have been “of no force or effect.” On the other hand, provisions that contravene the *Bill of Rights* are merely “inoperative”. In invoking the Bill of Rights rather than the *Charter*, Beetz J. recalled that s. 26 of the *Charter* preserves “any other rights and freedoms that exist in Canada.” In addition, the minority argued that constitutional and non-constitutional instruments were drafted differently and could produce “cumulative effect”. Thus, statutory remedies should not be encouraged to fall into neglect.

b) Extension of *Charter* Remedies to Administrative Discretion

The “cumulative effect” of constitutional and non-constitutional remedies was confronted by the creeping jurisdiction of *Charter* remedies, which by their breadth and power, have arguably engulfed many other common law and statutory remedies. This was the case in *Slaight*. Whereas the *Charter* had been applied to legislation, the policy developed in *Singh* suffered an important blow when the court developed a methodology for applying the *Charter* not only to legislation but also to administrative action.

Until *Slaight*, the relation between s. 1 and administrative discretion had been unclear. At a first stage, courts did not believe the *Charter* applicable to the exercise of administrative discretion but simply statutory conferrals of administrative discretion. In *R. v. S.(G.)*, Dickson C.J., speaking for a unanimous Supreme Court, stated that the *Charter* did not apply to the exercise of discretion, but only to the enabling instrument.⁷⁶⁰ Thus, a governmental decision could not be challenged under s. 15(1) of the *Charter*, which was treated as a *lex specialis* with regard to governmental action; even if an authority

⁷⁶⁰ [1990] 2 S.C.R. 254 .

qualified as government for the purposes of s. 32(1), it would not come under scrutiny for the purposes of s. 15(1) unless its action qualified as “law”.

Similarly, D. Mullan, initially argued that the expression “prescribed by law” in the *Charter* meant only legislation was reviewable under the *Charter*, not administrative decisions.⁷⁶¹ This position is perhaps understandable because the *Charter* did impose many important changes on Canadian legal thinking, although it reflects the notion that “law” is general and abstract, and ignores its individualisation. As one commentator noted: “Because we are afraid of discretion we deny its place in law.”⁷⁶² This was reflected in the distinction between “discretion” and “interpretations of the law”. However, the *Baker* case set aside this distinction putting the “discretion” and administrative interpretations of the law on the same footing.⁷⁶³ This evolution is reflected in the changing definition of “law”. In *Operation Dismantle*, Dickson C.J. stated: “[N]othing in these reasons should be taken as the adoption of the view that the reference to “laws” in s. 52 of the *Charter* (sic) is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed by section 52 is to be meaningful, then all acts taken pursuant to powers granted by law fall within section 52.”⁷⁶⁴

Nevertheless, the general approach was that s. 1 was applied indifferently to “limitations of rights”, without any specification as to what law would have to be justified: the administrative decision or the statutory conferral of discretion. Thus it was said that when a limitation of individual rights was attributable to the action of officials rather than to the text of the law, such a limitation could not be justified with regard to s. 1 of the *Charter*. For instance in *Simmons v. R.*,⁷⁶⁵ an individual charged with importing narcotics was not informed of her right to counsel, as required by s. 10 (b). The government argued that the *Customs Act*, under which the appellant had been charged, did not contain any reference

⁷⁶¹ D. Mullan, “Judicial Deference to Administrative Decision-Making in the Age of the *Charter*” (1985) 50 Sask. L. Rev. 203 at 219 [Mullan, “Judicial Deference”].

⁷⁶² S. Wexler, “Discretion, the Unacknowledged Side of Law” (1975) 25 U.T.L.J. 120 at 123.

⁷⁶³ *Baker*, *supra* note 169.

⁷⁶⁴ *Operation Dismantle v. R.*, [1985] 1 S.C.R. 441 at 459 [*Operation Dismantle*].

⁷⁶⁵ [1988] 2 S.C.R. 495.

to a right to counsel. In response, the accused argued that the government's actions could not be duly prescribed by law. In rejecting the government's position, Dickson C.J. said that a denial of a right to counsel was a limitation of guaranteed rights and that this limitation was not prescribed by law and therefore not justified with regard to s. 1.⁷⁶⁶

However, it was not clear what had to be justified, namely the statute, or the governmental decision. Indeed, by opposing two opposite claims on individual rights – a plaintiff bringing forth a factual situation arguing that his or her rights have been violated, a government arguing that a law does not constitute a violation of individual rights or that the violation is justified, there was no clarity on the subject matter of the dispute: the exercise of statutory power, or the statute itself. This could be all the more complicated because of the existence of one or many discretionary powers, but also individual governmental decisions. In this respect, the dichotomy between violation and justification confused the validity of legislation and the violation of individual rights under the *Charter* and ultimately lead to government rebuking a claim by defending the validity of a statute, an argument that may have been irrelevant to the resolution of the dispute, while leaving judges with the task of providing an answer to a problem that had improperly been argued.

This problem was clarified in *Slaight* in the dissenting opinion of Lamer C.J., who distinguished between applying s. 1 to administrative orders and legislation. This case concerned an adjudicator acting under statutory powers, who had found that an employee had unjustly been dismissed. Instead of reinstating the employee, he issued two orders: the first to the effect that the employee be given a letter of reference in order to obtain further employment, and more specifically an acknowledgement of the employee's achievements, the second to the effect that the employer not say anything negative about the former employee should any enquiry be made. The employer contested both orders as a violation of freedom of expression. The majority held that both orders were justified under s. 1. The orders were justified because they were made pursuant to the statute, although it did not provide any explicit power to order the provision of a letter of

⁷⁶⁶ *Ibid.*, Beetz, Lamer and La Forest JJ. concurring.

reference or make prohibitive orders. These powers, nevertheless, were implied in the statute because their purpose was in line with its general objective.

The dissenting opinion of Lamer J., which was accepted by the majority for the methodology that it proposed, stated that only the first order was justified with regard to s. 1. However, his methodology for analyzing the legal issues at hand was different from that used by the majority, but nevertheless approved by all. The difficulty he found with the majority's methodology was with its use of s. 1. On the one hand, if the majority found that the victim's right had been violated but that such a violation was justified with regard to s. 1 in both instances, it did not specify the source of the violation, nor even the source of the justification. In order to clarify this point, Lamer distinguished between two types of statutory conferrals of discretion. On the other hand, the statute conferred the power to infringe a *Charter* right, although this power did not appear expressly in the statute or by necessary implication. In this case, it was not the statute that had to be justified with regard to s. 1, but the decision taken thereunder. Any decision that infringed the *Charter* and could not be justified with regard to s. 1 would therefore be *ultra vires*. As Lamer stated, "an administrative tribunal may not exceed the jurisdiction it has by statute."⁷⁶⁷ Moreover, "if the action is not justified (with regard to s. 1), it has necessarily exceeded its jurisdiction".⁷⁶⁸ This ruling therefore recognises that the exercise of statutory power can be unconstitutional, but also provides a methodology for dealing with statutory discretion and the *Charter*.

However, implied in *Slaight* was that the exercise of administrative discretion would have to be litigated as a constitutional issue. This was also the case in *Ross v. New Brunswick*,⁷⁶⁹ the Court was presented with both *Charter* and administrative law grounds, and decided the case on *Charter* grounds. The suggested approach for contesting the exercise of discretionary powers would therefore be to raise a constitutional issue, and treat the matter as one of constitutional law. Thus, in *Eldridge v. British Columbia*, the Supreme Court held that "the *Charter* may be infringed, not by the

⁷⁶⁷ *Slaight*, *supra* note 273 per Lamer J. at 1078.

⁷⁶⁸ *Ibid.* at 1080.

⁷⁶⁹ [1996] 1 S.C.R. 825 [*Ross*].

legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.”⁷⁷⁰

2. Redress under s. 52(1): the Doctrine of Constitutional Applicability

The “as applied” approach established in *Slaight* has been criticised for giving rise to an “*ultra vires* rule twice over”.⁷⁷¹ Indeed, the doctrine implies that parties may be required to raise constitutional arguments even where a statute is valid, thus raising their burden of proof and implying greater costs. However, the “as applied” approach has not only been limited to individual remedies under s. 24(1), but has affected the review of legislation under s. 52(1). This has enabled courts to declare legislation, unconstitutional, “as applied” in a given situation. The notion of “constitutional applicability” is generally opposed to “constitutional validity”, although its meaning is far from clear. For Strayer, it was “presumably thought to be necessary to cover situations where a court is asked to “read down” a statute so as to avoid a conflict with a right or freedom guaranteed by the *Charter*.”⁷⁷² Its origins can be traced back to the U.S., where a distinction is made between statutory validity on its face, and statutory validity “as applied”. In this last case, its invalidity will only affect the parties to the dispute and will survive as far as third parties are concerned, whereas an invalid statute “on its face” will affect all concerned individuals.

The doctrine of “constitutional applicability” and the opposition to a presumption of constitutionality are related since both reflect a lesser threshold upon which statutes will be held unconstitutional. However, while the doctrine of constitutional applicability compensates by limiting the effects of the unconstitutionality to the parties to the dispute,

⁷⁷⁰ *Eldridge supra* note 153 at 643-44.

⁷⁷¹ Expression used by Butler, *supra* note 334 at 236.

⁷⁷² Strayer, “Canadian Constitution”, *supra* note 2 at 76. See also J. M. Ross, “Applying the *Charter* to Discretionary Authority” (1991) 29 *Alta. L. Rev.* 382.

it confuses the violation of individual rights with the validity of a statute, issues which do not necessarily overlap. Moreover, the doctrine is problematic for Canada because s. 52(1) holds that laws that are unconstitutional are “of no force and effect”, which is the main distinguishing factor between the U.S. and Canadian approach to the effects of and “unconstitutional law”. As Hogg says, “A law enacted outside the authority granted by the Constitution is *ultra vires*, invalid, void, a nullity.”⁷⁷³ This position conflicts with the doctrine of “constitutional applicability”, which holds that the unconstitutionality of a statute only affects the parties to the dispute. Thus, the question arises as to whether the doctrine can be reconciled with the supremacy clause.

a) Distinction between “On-Face” and “As-Applied” Review

By holding that a statute is unconstitutional “as applied” in a given case, the doctrine of “constitutional applicability” links the validity of a given statute with the violation of rights and thus does not seek to determine whether a statute is valid but wrongly applied, or invalid altogether.

The “as applied” approach to the validity of legislation is reflected in notice requirements requiring notice for issues of “constitutional applicability”.⁷⁷⁴ It is also reflected in the Canadian distinction between “adjudicative” and “legislative” facts. Indeed, judges must take notice of the Constitution and interpret valid legislation in accordance therewith even when it is not pleaded by the parties in a dispute: “The essence of the concept of judicial notice is the acceptance by the court of a matter of fact or law without the necessity of formal proof in the form of evidence adduced by one of the parties.”⁷⁷⁵ Thus, judges are constrained by the fact that when they are faced with the violation of rights arising out of the exercise of administrative power, they must interpret legislation in accordance with the Constitution, without of course emasculating it altogether. Thus,

⁷⁷³ Hogg, *Constitutional Law*, *supra* note 9 at 55.1

⁷⁷⁴ See above, a) Evolution of Notice Requirements.

⁷⁷⁵ B.G. Morgan, “Proof of Facts in *Charter* Litigation” in Sharpe, *Charter Litigation*, *supra*, note 3, 169 at 171.

while the distinction between legislative and adjudicative facts has traditionally sought to isolate issues of which courts should take stronger notice (legislative facts, i.e. the Constitution), the Canadian definition reflects more one of cause and effect and thus implies that a statute can be unconstitutional if it produces unconstitutional effects.

For instance, in *Danson v. Ontario (A.G.)*,⁷⁷⁶ Sopinka J. stated: “In general, any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects.”⁷⁷⁷ The kind of evidence referred to here is “adjudicative facts”, namely “those that concern the immediate parties... who did what, where, when, how, and with motive or intent? Such facts are specific and must be proved by admissible evidence.”⁷⁷⁸ Where the purpose of the impugned law is impugned, courts will look at “legislative facts”, namely those “of a more general nature and are subject to less stringent admissibility requirements”,⁷⁷⁹ including the legislative history but also post-enactment data.⁷⁸⁰ In contrast, the traditional definition of adjudicative and legislative facts does not distinguish between effects of laws and purposes of laws, but rather between elements that can more readily be agreed upon (i.e. legislative history).

However, Sopinka J.’s definition of adjudicative facts does not distinguish between unconstitutional effects of legislation that are caused by its proper or improper interpretation. Presumably, his definition of “adjudicative facts” would cover cases where a valid law has been applied unconstitutionally, but also cases where the unconstitutional “effects” of a law outnumber those constitutional, which cause the law to be unconstitutional on its face. Nevertheless, in both cases the demonstration required by the plaintiff is described as identical. However, demonstrating that a valid law has produced

⁷⁷⁶ [1992] 2 S.C.R. 1086.

⁷⁷⁷ *Ibid.* at 1101.

⁷⁷⁸ *Ibid.* at 1099.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ For a discussion on these concepts, see J.I. Laskin “Evidentiary Considerations Under the Canadian Charter of Rights and Freedoms” in *The Charter: The Civil Context* (Law Society of Upper Canada, Xerox version, Feb. 23 1983); the distinction is proposed by K.C. Davis in “An Approach to Problems of Evidence in the Administrative Process” (1942) 5 Harv. L. Rev. 364.

unconstitutional effects should not be as demanding as demonstrating that a law produces so many unconstitutional so as to render it invalid.

b) Problems Related to the Notion of “Constitutional Applicability”

Eaton illustrates the problems arising out of the doctrine of “constitutional applicability” and its variable acceptance before the Supreme Court.⁷⁸¹ In this case, an appeals tribunal confirmed the decision of a school board that a disabled child could no longer be taught in a regular classroom and had to be reassigned to a special class for disabled children. S. 8 of the *Ontario Education Act* conferred on the Minister of Education the power to make special education programs for Ontario children. In Superior Court, the applicants put forward substantive arguments concerning discrimination on the basis of the *Charter*, the *Ontario Human Rights Code* and the common law. However, the application was dismissed and the applicants then appealed, arguing procedural impropriety at common law. The applicants did not argue the *Act* was unconstitutional, nor the order itself since the Minister was entitled to make such an order, but the reasons for which it was made. In allowing the appeal, Arbour J. A. ruled that the *Act* was unconstitutional because it did not prohibit the Minister from exercising his power in an unconstitutional manner. In doing so, she revived the *Charter* arguments and held that the divisional court had erred in finding no violation of s.15 of the *Charter* and that the *Act* could not be saved under s.1.

Arbour J.A.’s reasoning was based on the dissenting opinion of Lamer J. in *Slaight Communications*, stating that the justification required by s. 1 should be applied either to the administrative order, or to the legislation in question, depending on the source of the violation. Arbour J.A. stated that nothing in the legislation prohibited the board from taking its decision for reasons that conflicted with the *Charter*. Because the order was based on the “faulty” legislation, this finding meant that it too was unconstitutional and had to be quashed. Thus, she held that the legislation was invalid on its face and therefore

⁷⁸¹ *Eaton*, *supra* note 574.

had to be read so as to correct the omission. However, Arbour J. A. did not ask parties to notify the Attorney General, who had appeared in the proceedings, but had not been invited to make any submissions on the constitutional issue.

On appeal, the Supreme Court held that because Arbour J.A. had raised the arguments *proprio motu*, there was no opportunity for the provincial Attorney General to take notice of the constitutional question, as required by section 109 of the Ontario *Courts of Justice Act* (CJA). The majority stated that the fact that it could be read in an unconstitutional manner did not necessarily make it unconstitutional, but rather that it had to be interpreted insofar as possible so as to accord with constitutional values. The majority therefore stated that the statute was not unconstitutional because it did not explicitly prohibit the action taken by the tribunal. Thus, instead of being unconstitutional because s. 15 had to be engrafted onto the statute, the majority held that this was not a holding of unconstitutionality, but oppositely to the Court of Appeal, evidence that the statute was constitutional because it could sustain an interpretation that accorded with the Constitution.

The separate opinion of Lamer C.J.C. and Gonthier J. took the argument further by stating that the proper step in this instance was not even to bring into question the constitutionality of the statute, but rather to interpret it in a manner so as not to allow the violation of the *Charter*.⁷⁸² This position follows the *Eldridge* principle, which holds that administrative authorities do not have the power to violate the *Charter*, and if they do, it is because their statutory powers are themselves unconstitutional. To this effect, a misapplication of the *Charter* by government should only trigger an interpretative issue, and if the interpretation of the legislation cannot be reconciled with the *Charter*, then it will be that the legislation in question does trigger legitimate doubts as to its constitutionality, in which case a constitutional question, in the full sense of the term will arise and therefore trigger notice requirements.

⁷⁸² *Ibid.* at 248.

The solution adopted by Arbour J.A., and the ensuing debate in the Supreme Court on the necessity of notifying the Attorney General for issues of statutory interpretation demonstrates the confusion generated by the notion of “constitutional applicability”. The separate opinion is more consistent insofar as it confirms that a statute should be interpreted insofar as possible before declared unconstitutional, although it conflicts with the notion of “constitutional applicability” in the *Ontario Courts of Justice Act*, which requires notice where a statute has been applied in a manner that substantively incompatible with the Constitution. Although Arbour J.A.’s analysis was overturned, it follows the idea that a statute will be unconstitutional if it needs to be “read-in”, and is perfectly consistent with the doctrine of “constitutional applicability”.

3. Distinction between “Application of the Law” and “Application of the *Charter*”

The logical consequence of the autonomy of the *Charter* from the process of statutory interpretation has been that even in situations where a statute is valid, individuals must raise a constitutional issue in order to obtain redress.

Canada (A. G.) v. Mossop demonstrates the initial position of the Supreme Court, which drew a hermetic distinction between statutory and constitutional interpretation.⁷⁸³ In this case, a collective agreement applicable to the appellant, Mr. Mossop, provided for leave upon the death of an employee’s immediate family. However, in spite of having been living with his partner for 17 years, Mossop was denied such a benefit to attend his partner’s father’s funeral because his partner was of the same sex. Canadian Human Rights Tribunal found that it had jurisdiction over the matter, as it related to “family status” and ruled that the employer and the union had violated s. 10(b) of the *Act*, for having entered into a collective agreement that restricted leave to members with spouses of the opposite sex and such provisions of the collective agreement conflicting with the *Canadian Human Rights Act* (CHRA) were held as invalid. An application for judicial

⁷⁸³ [1993] 1 S.C.R. 554 per Lamer C.J.C., La Forest, Sopinka, Cory, McLachlin and Iacobucci JJ. (L’Heureux-Dubé, Cory and McLachlin dissenting) [*Mossop*].

review before the Federal Court of Appeal was granted and this decision was set aside. The Supreme Court, however, did not allow Mossop's appeal, stating that the term "family status" in the CHRA excluded the jurisdiction of the Tribunal.

However, the standard of review used to come to this conclusion is far from clear. The government argued that the appropriate standard was one of "patent unreasonableness", although as Lamer pointed out, this was inappropriate since there was no clause precluding review.⁷⁸⁴ For *La Forest and Iacobucci JJ.*, the standard of review was correctness, although in conclusion, they stated that the inclusion of the word "family status" purported to exclude homosexual couples, and absent any constitutional challenge, statutory intent could not be defeated.⁷⁸⁵ Conversely, the Court also pondered the finding that Mr. Mossop did not benefit from "family status" could also be considered as a question of fact. In this respect, it could also be deferred to in spite of the absence of a privative clause.

Lamer C.J., however, stressed that the question, as it had been put the Supreme Court, was not whether or not the government or the unions should or should not extend such benefits to homosexual couples.⁷⁸⁶ However, Lamer C.J. stated that such a conclusion was exclusively reached using common law principles of statutory interpretation. The parties had not relied on the *Charter* and therefore the legislation could not be interpreted so as to necessarily comply therewith. In his words:

Absent a *Charter* Challenge of its constitutionality, when Parliamentary intent is clear, courts and administrative tribunals are not empowered to do anything by apply the law. If there is some ambiguity as to its meaning or scope, the courts should, using the usual rules of interpretation, seek out the purpose of the legislation and if more than one reasonable interpretation consistent with that purpose of the legislation is available, that which is more in conformity with the *Charter* should prevail.

But, I repeat, absent a *Charter* challenge, the *Charter* cannot be used as an interpretative tool to defeat the purpose of the legislation or to give the legislation an effect Parliament clearly intended it not to have.⁷⁸⁷

⁷⁸⁴ *Ibid.* at 582-83.

⁷⁸⁵ *Ibid.* at 587.

⁷⁸⁶ *Ibid.* at 618.

⁷⁸⁷ *Ibid.* at 581. Lamer's judgement is very similar to that of Stone J.A., who guarded himself from any constitutional pronouncement: "If the statutory term, construed as I think it should be construed, is thought

Between the time that the arguments had been presented to the Court and its ruling, however, important developments in the law had taken place. First, in *Schachter*, the Supreme Court confirmed that it could “read in” rights into a statute so as to conform its interpretation to the Constitution.⁷⁸⁸ Second, the Ontario Court of Appeal in *Haig v. Canada* added sexual orientation to the prohibited grounds of discrimination contained in the CHRA.⁷⁸⁹ Because of these developments, the Court invited the parties to submit new arguments. Had the parties done so, “(i)t would then have been possible to give a much more complete and lasting solution to the present problem”.⁷⁹⁰

Lamer stated that the parties had stated their allegations incorrectly but that the inclusion of the expression “family status” in the CHRA demonstrated an intention on the part of Parliament to discriminate on the basis of sexual orientation, thereby excluding homosexual partners from any protection thereunder.⁷⁹¹ Thus, according to the majority, the purpose of the *Act* was to discriminate on the basis of sexual orientation. Lamer C.J., noted that when the CHRA was passed and amended in 1983, it “refused at the same time to prohibit discrimination on the basis of sexual orientation”.⁷⁹² Lamer C.J., speaking for the majority, stated that the outcome of the dispute could have been different had the parties contested the constitutionality of the CHRA, instead of concentrating their efforts on arguing that the term “family status” also included homosexual couples.⁷⁹³ However, the appellants had not chosen to take this approach and resolve the dispute solely on the basis of the interpretation of the expression “family status” in the CHRA. Interpreting the expression “family status” so as to include homosexual couples was possible in the view of the appellants, because the CHRA did not explicitly discriminate on the basis of sexual

to conflict with the provisions of the *Charter* then the constitutional validity of that term must be put in issue for the *Charter* to play a role in resolving the dispute.” *Canada (A.G.) v. Mossop*, [1991] 1 F.C. 18 at 43 (C.A.) [*Mossop CA*].

⁷⁸⁸ *Supra* note 279.

⁷⁸⁹ *Supra* note 121.

⁷⁹⁰ *Mossop*, *supra* note 783 at 580.

⁷⁹¹ R.S.C. 1985, c. H-6, s. 10(b).

⁷⁹² *Mossop*, *supra* note 783 at 557.

⁷⁹³ This was equally the case on appeal, although the parties had invoked the *Charter*, arguing that it mandated the expression “family status” to include same-sex couples. See *Mossop CA*, *supra* note 787. The Canadian Human Rights Tribunal, however, had referred to the *Charter* as a source of interpretation.

orientation. However, Lamer stated “I can do no more than dispose of this appeal on the basis of the law as it stood at the time of the events in question.”⁷⁹⁴ As a result, the government’s appeal was allowed and Mossop’s claim dismissed.

The reason for not addressing Mossop’s claim could not have been procedural: notice was irrelevant since the appropriate Attorney General was already a party to the dispute, and the Court had asked Mossop to raise *Charter* arguments, something he declined because he did not believe the law in question to be unconstitutional. The question was not whether the Court should have strayed beyond Mossop’s submissions, but whether it was legitimate to require constitutional argument on the matter.

One of the main reasons for requiring constitutional argument in *Mossop* was that during the appeal, the Ontario Court of Appeal ruled in *Haig* on an identical issue, namely that the CHRA was not invalid because it did not list sexual orientation as a ground of discrimination, but rather ruled that the CHRA could be interpreted so as to include this ground. This position was later indirectly confirmed by the Supreme Court in *Vriend v. Alberta*.⁷⁹⁵ In this case, the question was whether or not the omission of “sexual orientation” in the *Individual Rights Protection Act* (IRPA) invalidated this instrument.⁷⁹⁶ The majority ruled that it did not. Rather, the IRPA was interpreted so as to include this ground of discrimination. “Reading sexual orientation into the offending sections would minimize interference with this clearly legitimate legislative purpose and thereby avoid excessive intrusion into the legislative sphere whereas striking down the IRPA would deprive all Albertans of human rights protection and thereby unduly interfere with the scheme enacted by the legislature.”⁷⁹⁷ In light of this, the majority assumed that, given the open wording of the IRPA, the Alberta legislature had not excluded sexual orientation as a prohibited ground of discrimination.

⁷⁹⁴ *Mossop*, *supra* note 783 at 580.

⁷⁹⁵ *Vriend*, *supra* note 353.

⁷⁹⁶ R.S.A. 1980, c. I-2.

⁷⁹⁷ *Vriend*, *supra* note 353 at 498.

Arguably, the remedy in this case would clearly not have been to declare the word “family” unconstitutional, but simply to interpret this term as including same-sex couples living in stable relationships. This was the case in the UK, where the judicial review of legislation is in principle prohibited. In *Fitzpatrick v Sterling Housing Association Ltd*, the House of Lords reached the opposite interpretation of the word “family”.⁷⁹⁸ In its view, the term was not limited to legally binding relationships. The hall marks of a family relationship were mutual inter-dependence, commitment and support. Thus, Lord Slynn of Hadley concluded that in considering who today was capable of being members of a tenant’s family, it was necessary to acknowledge changes in attitude towards same-sex relationships.⁷⁹⁹ However, the absence of a general presumption of constitutionality, which is said to have been established in order to protect the rights of individuals, has done exactly the opposite and has accordingly obliged them to exaggerate their claims in order to obtain redress. While the Court stated in *Mossop* that it required more argument from the parties on *Charter* issues, there is no excuse for not addressing the plaintiff’s claim as a question of statutory interpretation, as did the House of Lords in the UK.

4. *Baker v. Canada*: Dissociation of Grounds and Standards of Review

A crucial step in the development of Canadian administrative law was achieved in *Baker*,⁸⁰⁰ a case that can usefully be contrasted with *Slaight*, *Mossop* and *Eaton*. In this case, L’Heureux-Dubé J., speaking for the majority of the Supreme Court, held that administrative discretion must be exercised within the boundaries of the discretion-conferring statute, but also in accordance with “the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.”⁸⁰¹ This case concerned the deportation of a woman illegally residing in Canada, and whose schizophrenia and imminent separation from her children

⁷⁹⁸ *Fitzpatrick v Sterling Housing Association Ltd.* (1999), [2001] 1 AC 27.

⁷⁹⁹ *Ibid.* at 31. Lord Slynn of Hadley referred to *Mossop* as reflecting cases “still in an early stage of development of the law”. *Ibid.* at 40.

⁸⁰⁰ *Baker*, *supra* note 169.

⁸⁰¹ *Ibid.* at 855.

did not inspire the government to stay her extradition on compassionate or humanitarian grounds as provided by the statute. Rather, during the discovery process, it was learned that governmental authorities had acted under the motivation that Canadian finances could no longer sustain “cases such as hers”. In doing so, the Supreme Court held that Minister of Employment and Immigration’s refusal to stay extradition proceedings on compassionate grounds was illegal.

The ratio in *Baker* is important for the understanding of the relation between the *Charter* and administrative law and can explain it in two different ways. On the one hand, it could be read as implying that administrative authorities cannot violate *Charter* rights. However, there is nothing new in this interpretation. Moreover, by ruling exclusively on administrative law grounds while stating that administrative discretion must comply with the *Charter*, the majority seemed to emphasize that even if the case is not litigated as a constitutional issue, administrative discretion must necessarily be exercised in accordance with the *Charter* in the sense that only statutory interpretations constituting reasonable limitations of individual rights are admissible. This is a preferable solution because it would put an end to much uncertainty regarding the relation between constitutional and administrative law grounds of review.

a) Distinguishing Factors in *Baker*

Baker was litigated on both constitutional and administrative law grounds, but the majority decided that it was not necessary to resolve the case on constitutional grounds.⁸⁰² Accordingly, it ruled that legislation was to be interpreted as complying with the domestic and international obligations of the Canadian government. The minority stated that the case should have been resolved on constitutional grounds and that the presumption that legislation is to be interpreted in accordance with Canada’s international

⁸⁰² L’Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ.

obligations could only be used insofar as only the *Charter* could be interpreted as reflecting Canada's international obligations.⁸⁰³

Baker marks a crucial step in the development of Canadian administrative law for several reasons, although its contribution to the tightening of judicial control over administrative discretion is of foremost importance. In *Slaight*, the majority used international conventions ratified by Canada in order to inform the interpretation of the *Charter*.⁸⁰⁴ However, because this case was decided as a question of administrative law, the majority confirmed this principle but also allowed international legal obligations to inform the interpretation of statutory discretion rather than indirectly through the *Charter*. In contrast, the dissenting opinion of Iacobucci and Cory JJ. stated that this would only be possible by allowing the international treaty to inform the interpretation of the *Charter*. However, since the matter had not been decided as a *Charter* issue, than it would not be possible to use Canada's international legal obligations as aids of interpretation. Thus, they concluded that the interpretative presumption developed by Lamer J. in *Slaight* requiring that administrative discretion be exercised in accordance with Canada's international legal obligations would only apply if the *Charter* had been discussed.⁸⁰⁵

However, the purpose of the interpretative presumption developed by Lamer in *Slaight* was directed at the relationship between statutes and the *Charter*, not Canada's international legal obligations. Whether international conventions ratified by Canada, regardless of their express incorporation into domestic law, should be part of elements taken into account in order to justify tighter judicial scrutiny over discretionary powers is accepted. If judges can refer to academic articles, they can surely refer to an international convention ratified by every member of the United Nations, if not as a direct cause of action but as an aid in interpreting statutory powers. Moreover, if the purpose of the presumption is to avoid constitutional issues at the outset, there is no reason why a dispute should be constitutionalised only to allow for international treaties to inform the *Charter*, of which judges in any case must take notice. Thus, the distinguishing ratio in

⁸⁰³ Cory and Iacobucci JJ.

⁸⁰⁴ *Slaight*, *supra* note 273 at 1056-57.

⁸⁰⁵ *Baker*, *supra* note 169 at 865.

Baker is that the applicants had argued their own both administrative and constitutional grounds although the case was decided as one of administrative law. Had conventional administrative law reasoning been used, it is clear that the minister would have been granted discretion to decide the issue. Had the *Charter* been used, it is clear that a remedy would have been available thereunder. However, in deciding the case as an administrative law case, and providing a remedy as would have been done under the *Charter*, the Supreme Court acknowledged the necessary and implicit legal effect of the *Charter* in the judicial review of administrative action. In this respect, *Baker* consecrates the “uncoupling” of the *Charter* from the courts’ decisions interpreting it.⁸⁰⁶

However, the greatest advance of the *Charter* in terms of administrative is not the substantive rights protected insofar as these have received protection prior to 1982, but the structuring of the standard of review which evolve with the arguments of the parties and therefore only limits the intensity of judicial scrutiny as to the necessity of the facts of each case. However, *Baker* demonstrates that it is difficult to accept that these techniques operate in parallel to those available at common law as discreet remedies available under s. 24(1), as opposed to establishing a new system for the review of government action. What *Baker* appears to have accomplished is to set aside possible statutory interpretations that are contrary to the *Charter* and only allow for those that conform to it. Thus, *Baker* could be interpreted as confirming the general rule that legislation may not allow for the violation of the *Charter*, unless such legislation is itself unconstitutional.

b) Uncertain Legacy of *Baker*

If *Baker* appears to have established the principle that government action taken under a valid delegation of administrative power must necessarily comply with the *Charter*, this

⁸⁰⁶ G. Huscroft, “Uncoupling the *Charter* from the Court’s Decisions Interpreting It” (Presented at Osgoode Hall Professional Development Conference, Toronto, April 2, 2004).

principle appears to have been mitigated by the unanimous ruling in *Suresh*,⁸⁰⁷ and more explicitly by the majority position in *Blencoe* which treats the *Charter* and administrative law as autonomous causes of action. This last case mitigates the effect of *Baker* insofar as it treats statutory interpretation and the provision of remedies under s. 24(1) for the exercise of discretionary power as two different legal claims.

In *Blencoe*, an individual applied for a stay of proceedings before the British Columbia Human Rights Commission using both administrative law and constitutional grounds. Much debate in this case was devoted to determining whether the *Charter* applied to the Commission. However, as this case demonstrates, the fundamental divide between majority and minority is not between those who believe that the *Charter* applies to Commission as “government” for the purposes of s. 32(1) of the *Charter* and those who do not, but what exactly qualifies as a constitutional issue. The majority ruled that there is no constitutional right outside the criminal context to be “tried” within a reasonable time.⁸⁰⁸ Having made this determination, the majority then stated that there were remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, it stated “delay, without more, will not warrant a stay of proceedings as an abuse of process at common law.”⁸⁰⁹

The minority had a very different approach to the problem. It did not rule on the constitutional issues but stated that the problem was not of constitutional nature. In its words:

The parties have fought this case mainly on *Charter* issues. In the end, this approach turned into a constitutional problem, something that it was not. The important and determinative issue should have been the role of judicial review and administrative law principles in the control of undue delay in administrative tribunal proceedings. Given that human rights commissions are administrative law creations, the first place we should look for solutions to problems in their processes is in the realm of administrative law.⁸¹⁰

⁸⁰⁷ *Suresh*, *supra*, note 642.

⁸⁰⁸ McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major and Bastarache JJ.

⁸⁰⁹ *Blencoe*, *supra* note 159620 at 101.

⁸¹⁰ *Ibid.* Iacobucci, Binnie, Arbour and LeBel JJ. at 383.

These cases illustrate the limitations of the alternative grounds doctrine. Canadian courts have often made statements of restraint while on the other hand disregarded the alternative grounds doctrine. Hogg argues that this is not necessarily harmful insofar as a pronouncement on the constitutional issue, when it has been argued is a good use of judicial resources because it can prevent future litigation on the same issue.⁸¹¹ However, the issue is avoiding unnecessary litigation at the outset. A ruling that certain government action is unreasonable is no less effective than a ruling that it was unconstitutional, although the latter ruling may add dramatic effect. In this respect, although the alternative grounds doctrine emphasises a distinction between constitutional and non-constitutional grounds, *Blencoe* demonstrates that there is far from any agreement on how to distinguish constitutional from non-constitutional issues.

5. Necessity of Unwritten Constitutional Principles

While it is easy to diabolize unwritten constitutional principles as illegitimate judicial creations,⁸¹² some argue that that *lex non scripta* is part of Canada's fundamental law and its return is neither illegitimate nor revolutionary.⁸¹³ However, the question is not whether unwritten constitutional principles are legitimate, but why has the theory of the implied bill of rights returned, in spite of all the forms of written and unwritten protection already available? As Hogg stated: "like freeway proposals and snakes, the theory does not easily die."⁸¹⁴ The question is therefore not whether unwritten constitutional principles are legitimate, but why, in an era of ever expansive human rights codes, international conventions, not to mention common law principles, have unwritten constitutional principles been a necessary addition to the law? Indeed, in spite of the numerous

⁸¹¹ Hogg, *Constitutional Law*, *supra* note 9 at 56.6(a).

⁸¹² R. Martin, "Making It Up As They Go Along: Herein of the "Unwritten Constitution" in *The Most Dangerous Branch: How the Supreme Court has undermined our Law and Democracy* (Montreal: McGill-Queen's, 2003) at 115.

⁸¹³ M. D. Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 *Univ. of Toronto L.J.* 91.

⁸¹⁴ Hogg, *Constitutional Law* at 31.4(c).

references to unwritten constitutional principles, it is difficult to conclude that they have been a necessary addition to the law.

Although *Lalonde* confirms that unwritten constitutional principles have made a substantive impact on individual rights, the case demonstrates that the re-emergence of the implied bill of rights as “unwritten constitutional principles” cannot be interpreted without looking at the evolutionary nature of judicial standards of review, particularly in light of the greater warrant of judicial power provided with the *Charter*. On the one hand, it is difficult to accept that the Government of Ontario could thwart francophone rights by establishing commissions whose decisions must only take into account limited policy objectives, to the exclusion of valid legislative schemes such as the FLSA. On the other, it is difficult to accept unwritten constitutional principles without unfairly jeopardizing the scheme set out in the *Charter*, and the affirmation of parliamentary sovereignty confirmed in s. 33(1). Nevertheless, *Lalonde* can be reconciled with these imperatives if it is analysed as representing a greater standard of review, namely in light of the various techniques developed under the *Charter*, as opposed to introducing an “implied bill of rights”.

At the outset, the disparity between administrative and constitutional law standards of review has several causes, one of which being the likening of “correctness” to a statutory right of appeal. As a result, this has limited the development of any independent doctrine of “proportionality” aside from that available under the *Charter*. This has resulted in greater judicial scrutiny, albeit only in areas substantively overlapping with *Charter* rights, and only when the violation of *Charter* rights has been claimed. Indeed, the difficulty about the debate on unwritten constitutional principles is that they can be interpreted in two different ways: as constitutional principles in the substantive sense – that is, important, fundamental, basic principles. In this case, they can be used in the interpretation of legislation and thereby constitute limits on government action, while not impeding legislative power. As such, they closely resemble what some have termed

“constitutional common law”.⁸¹⁵ Unwritten or structural principles can also be constitutional in the formal sense, that is, as part of the Canadian Constitution. In this case, they can be considered as substantive limitations on electoral sovereignty. This debate asks whether there are substantive limits on the legislative branch that go beyond the written constitution. However, with the enactment of the notwithstanding clause, this debate is moot, although it points the greater political question as to whether legislative power is based in the democratic process or in the larger conditions in which it should be exercised.⁸¹⁶

Before the enactment of the *Charter*, debate on unwritten constitutional principles illustrated divergence on these two interpretations of their role. This debate remains today. Thus, while opposed to the idea of an implied bill of rights, B. Laskin noted that civil liberties although not entrenched in the Constitution, were frequently used “as a means of curial control of administrative adjudication”.⁸¹⁷ F.R. Scott on the other hand supported the idea of an implied bill of rights, not only at the administrative level, but equally to limit parliamentary sovereignty.⁸¹⁸

However, since the enactment of the *Charter*, the debate remains, particularly between authors who accept, or reject unwritten constitutional principles as a whole, without necessarily distinguishing their different possible functions. For instance, R. Elliot, who by drawing on Australian doctrine, distinguishes between the use of unwritten or structural principles “as independent bases upon which to impugn the validity of legislation” and their use “as aids to interpretation or otherwise to assist in the resolution of constitutional issues”.⁸¹⁹ Elliot suggests that when used to impugn the validity of legislation or government action, the unwritten principles “can fairly be said to be

⁸¹⁵ H.P. Monaghan, “The Supreme Court, 1974 Term – Foreword: Constitutional Common Law”, (1975) 89 Harv. L. Rev. 1.

⁸¹⁶ H.W.R. Wade, “The Basis of Legal Sovereignty” [1955] Cambridge L.J. 172.

⁸¹⁷ “An Inquiry Into the Diefenbaker Bill of Rights” (1959) 37 Can. Bar Rev. 77 at 81. See also Paul C. Weiler, “The Supreme Court of Canada and Canadian Federalism” (1973) 23 U.T.L.J. 307 at 344.

⁸¹⁸ F.R. Scott, *Civil Liberties and Canadian Federalism* (Toronto: University of Toronto Press, 1959) at 21; see also D. Gibson, “Constitutional Amendment and the Implied Bill of Rights” (1967) 12 McGill L.J. 497.

⁸¹⁹ “References, Structural Argumentation and the Organizing Principles of Canada's Constitution” (2001) 80 Can. Bar Rev. 67 at 83-6.

generated by necessary implication from the text of the Constitution". On this theory, when giving rise to rights capable of impugning the validity of legislation, individual rights are grounded in the text of the Constitution. On the other hand, Elliot also recognizes principles from a second category, those which although not written, can be said to "underlie – in the sense of helping to explain the inclusion of – provisions of the text of the Constitution".⁸²⁰ Monahan also distinguishes between both types of constitutional principles, stating that courts "should attempt to fill in that gap by adopting an interpretation that is most consistent with the underlying logic of the existing text, and then to rely upon that logic in order to "complete" the constitutional text."⁸²¹ This opinion therefore does not support the redrafting of the Constitution, while at the same time conceding the possibility of adornments.⁸²²

Nevertheless, at the other end of the spectrum, Hogg rejects the idea of an implied bill of rights (which one would assume includes unwritten constitutional rights) because it conflicts with the doctrine of parliamentary sovereignty.⁸²³ This overall rejection of unwritten constitutional rights can be contrasted with Mullan's position, who states that even after the enactment of the *Charter*, "the deployment of unwritten, underlying constitutional norms as a way of at least questioning particular exercises of discretion or executive action may still be viable in certain circumstances".⁸²⁴ Similarly, S. Choudhry questions the propriety of using unwritten principles to challenge the validity of legislation, but does not oppose their use to review administrative action: "To the extent that unwritten principles have been used to control executive action, they function in a manner similar to the common law grounds of judicial review of administrative action."⁸²⁵

⁸²⁰ *Ibid.* at 84.

⁸²¹ "The Public Policy Role of the Supreme Court of Canada and the Secession Reference" (1999) 11 N.J.C.L. 65 at 75-7.

⁸²² *Ibid.* at 77.

⁸²³ Hogg, *Constitutional Law*, *supra* note 9 at 31.4(c).

⁸²⁴ Mullan, *Administrative Law* *supra* note 10 at 128.

⁸²⁵ "Unwritten Constitutionalism in Canada: Where Do Things Stand?" (2001) 35 Can. Bus. L.J. 113 at 115.

However, in spite of the heated debate about unwritten constitutional principles, the fundamental question remains: without denying that the Canadian Constitution is made of “unwritten principles”, have the unwritten principles which authors debate been a necessary addition to the law? The only case, to this author’s knowledge, where they have been vindicated is *Lalonde*, although it is highly questionable as to whether it was necessary to invoke them. This is also the position of J. Leclair, who questions the legitimacy of unwritten constitutional principles, although recognises their legitimacy for reviewing administrative action.⁸²⁶ He argues that recourse to unwritten constitutional principles in *Lalonde* was unnecessary, arguing that the *French Language Services Act* provided sufficient grounds for review.⁸²⁷ Without going into the debate as to whether unwritten constitutional principles can limit Parliament and the legislation, this opinion can be approved. Indeed, it is questionable as to whether it was necessary to even have recourse to unwritten constitutional principles the Commission’s decision, as Sharpe J.A. ultimately conceded, was “patently unreasonable”.⁸²⁸

Conclusion

It is important to note that the alternative grounds doctrine, the exhaustion principle and the presumption of constitutionality have the common function of avoiding constitutional litigation in court although they do not inhibit individual protection under the *Charter*. Case-law discussed earlier in this thesis illustrates that the state action requirement was used only necessary when one of these principles had been circumvented. In both *McKinney* and *Eldridge*, the court allowed the claim to proceed even though the individuals had not exhausted the available means of redress. In *Blencoe*, reference to the state action doctrine was also made in light of the treatment of s. 7 of the *Charter* and natural justice as alternative claims. The minority did not need to refer to state action

⁸²⁶ *Ibid.*

⁸²⁷ J. Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” 27 (2002) Queen’s L. J. 389 at 415-416.

⁸²⁸ *Lalonde*, *supra* note 690 at 567-568.

because it treated the issue as one of administrative law, while nevertheless coming to a more generous conclusion than the majority. Thus, proper use of the exhaustion doctrine, the presumption of constitutionality, and the alternative grounds doctrine will enable the definition of solutions tailored to individual factual circumstances rather than the wholesale rejection or unnecessary constitutionalisation of disputes.

In many countries, including those of common law tradition, the presumption of constitutionality plays a crucial role in delimitating the threshold upon which constitutional issues need to be raised, while nevertheless not providing statutes with any special immunity.⁸²⁹ Thus, opinions regarding the status of the presumption have evolved, such that the Supreme Court has recognised a “limited” presumption of constitutionality, legislation is presumed consistent with the *Charter* unless a contrary intention is expressed. However, these developments leave much to be desired: such analysis views the *Charter* as an autonomous statutory remedy because it states that Parliament and the legislatures are constitutionally entitled to “violate” the *Charter*, if such an intent is expressed. However, legislation that “violates” the *Charter* is unconstitutional whereas legislation that limits *Charter* rights is not. In addition, the distinction between legislation that limits *Charter* rights and that which does not is of limited utility because all interpretations of valid legislation must necessarily constitute “reasonable limits” on individual rights.

While the Canadian legal community has sought to derive general rules for the definition of judicial standards of review, one thing is certain: the intensity of review can only reflect the factual particularities of each case. Thus under the *Charter*, J. Magner speaks of a “gradation of application intensity”.⁸³⁰ In contrast to those in the *Charter*, administrative law standards of review have been difficult to define because they have been determined independently of, and thus prior to substantive argument, and independently of debate regarding constitutional rights. Nevertheless, standards of review

⁸²⁹ Butler, *supra* note 334.

⁸³⁰ *Constitutional Law of Canada - Cases, Notes and Materials*, 8th ed. (Edmonton: Juriliber, 2001) at 78.

have always reflected constitutional considerations, which makes the definition of independent common law and *Charter* standards of review difficult to achieve.

In this respect, a rational system of judicial standards of review cannot be accomplished by isolating common law and *Charter* standards of review because the standard should not be determined according to the nature of the arguments put forward by the parties. Thus, because *Charter* rights do not operate in a juridical vacuum, particularly where the exercise of discretionary power is concerned, fairness to *Charter* principles can only be achieved by allowing standards of review to evolve with the argument of the parties, thereby determining whether an administrative decision is patently reasonable, reasonable, or correct to the objectives of the legislation under its correct interpretation with regard to *Charter*. While, while some have advocated a “spectrum” of standards in order to accommodate the particularities of each individual case,⁸³¹ standards of review can only be a meaningful if they represent benchmarks according to which behaviour is assessed. Nevertheless, allowing the intensity of review to evolve with argument will prevent the definition of a standard from baring factual elements otherwise necessary to a fair solution.

⁸³¹ Iacobucci, F. “Articulating a Rational Standard of Judicial Review: A Tribute to John Willis” (2002) 27 Queen’s L.J. 859.

General Conclusions

While the study of administrative law must concern itself with the factual realities of its everyday application, evidence suggests that its lack of solid theoretical underpinnings has not been without implications for individual rights. Indeed, cases that have made their way up the judicial ladder ultimately illustrate not a lack of consensus on substance, but oppositions in method and on means of approaching the relations between individuals and public authorities. Thus, if the *Charter* did not truly revolutionise the rights of individuals vis-à-vis government, public lawyers have yet to agree on the overall structure of their discipline, and this has ultimately affected the protection of individual rights.

Indeed, because administrative law and the *Charter* have been defined as separate bodies of law, the true impact of the *Charter* has yet to be acknowledged. However, as academics, judges, lawyers, and law students become accustomed to the *Charter*, it is decreasingly perceived as an autonomous statutory remedy, separate from the general law. Thus, the impact of the *Charter* can be assessed on the substantive outcomes in litigation, but also by how little it is mentioned in either. Moreover, it is not sufficient to question the impact of the *Charter* on individual rights in the administrative process and judicial remedies, but to question the impact of the *Charter* on administrative law as a whole.

As it is said, administrative law, like the other branches of the common law, was secreted through the interstices of judicial procedure. These origins prompted a description of administrative law as being centered on judicial power, remedy driven, fact specific, and resisting abstract foundations. The advent of administrative tribunals did not shake these foundations: jurists have sought to associate the protection of individual rights with the identification of judicial attributes. Neither did the advent of the *Charter*: autonomous cause of action, the *Charter* emerged as its own body of law, with its own body of remedies. Hence the search for administrative tribunals as “courts of competent

jurisdiction”, the power of administrative tribunals to grant “*Charter* remedies”, the autonomous notice procedure, the conflicting standards of review, and perceived autonomous foundations. However, the objective nature of the *Charter* as entrenched legal instrument, along with its abstract nature, conflict with these precepts. Thus, emphasis on the subjective nature of the *Charter* has supported the preservation of its autonomy. This has been achieved by focusing on contention as the essential concern of administrative law, even at the expense of maintaining that *Charter* remedies create *Charter* rights, that the *Charter* does not redefine administrative and judicial jurisdiction, and that only if a “*Charter* remedy” is requested, must it be pleaded in an institution bearing judicial attributes.

Would the judicial review of administrative action be any different had the *Charter* not been enacted? Canada has an abundance of statutory remedies, and thus, individuals can alternatively avail themselves of the *Bill of Rights*, the *Human Rights Act* and provincial human rights codes, not to mention international law as interpretative aid. It would therefore be possible to argue that the greatest impact of the *Charter* has been on the judicial review of legislation, rather than on the review of government action. Nevertheless, the *Charter* has given an important boost to Canadian administrative law both by the breadth of its application, and by its entrenchment, which has implied a much broader interpretation of its principles than would be possible with ordinary statutory remedies. From this perspective, the *Charter* has unified Canadian administrative law, without making it uniform since each jurisdiction can build upon *Charter* protection. Traditionally more deferential than their American counterpart, Canadian judges are now obliged to take a closer look at administrative decision-making.

The same can be said regarding the administrative process. Administrative tribunals cannot ignore the *Charter*. The *Charter* has enhanced individual protection, while displacing its effects upstream, in the administrative process. These important changes in the practice of administrative tribunals brought about by the *Charter* can be supported by the fact that during the twenty odd years of the *Bill of Rights*’ existence, not to mention other similar statutes pre-dating the *Charter*, there had been scarcely any question about

their effect on administrative authorities, if any at all. Considering the practice of administrative tribunals in relation to the *Charter* must therefore take into account their overall activity, and not just instances where the *Charter* has been violated. Thus, properly integrated, the *Charter* imposes a more a balanced view of administrative law, one that does not focus on contention, but that is concerned with both the administrative process and judicial review.

However, important problems remain. While it is true that governmental action cannot be assessed by an indiscriminate application of private law analogies, the theory of the constitutional cause of action raises the question as to whether the *Charter* can be treated as an autonomous body of law regulating the conduct of the government, operating independently and in total isolation from private law or whether the state action doctrine is a means of screening legal claims lacking sufficient cause of action in the factual sense. Between these two interpretations, the latter seems like the most reasonable because it would not require the definition of governmental activity subject to a derogatory legal regime, but rather the justification of judicial intervention based on the substantive circumstances of each case, which necessarily include the individual freedoms guaranteed by the *Charter*. This solution would avoid the impossible task of searching for a clear demarcation between public and private institutions, not to mention public and private activities.

Moreover, the *Charter* is part of a constitutional whole, and must be interpreted as such at both the administrative and judicial levels. First, giving administrative tribunals full power to set aside clearly worded primary legislation (with the caveat of not establishing a binding legal precedent) is not politically responsible nor is it administratively fair for other individuals in the administrative process. This debate, it has been argued, is the result of a polarising question, one which at its source implies that the *Charter* is an autonomous statutory remedy that does not redefine administrative power, but sees the *Charter* as extrinsic to administrative jurisdiction. Hence the question: to apply or not apply the *Charter*. Naturally, the scales have tipped in favour of the affirmative solution, although individuals must now face the caveat of calls for more independent tribunals,

stricter procedural controls such as notice of the attorney general, and the first steps towards the definition of administrative decisions as *res judicata* have been taken. Thus, the “judicialisation” of the administrative process. *Martin* and *Laseur* is a well intentioned ruling, but it is an extreme solution because the caveat of not creating a binding legal precedent is artificial. In addition, it is extreme because the power to withdraw the power to apply the *Charter*, *in toto*, is not one which can lawfully be granted to either Parliament or the legislatures, not even by having resort to s. 33(1).

Nevertheless, it is possible to balance both the effectiveness of the administrative process and constitutional supremacy, although only if the problem is not seen as a question of applying, or not applying the *Charter*. Essentially, this implies (1) distinguishing between the processes of “reading-in” and “reading-down” as part of the process of statutory interpretation, from other constitutional remedies to legislation such as severance and invalidity and (2) distinguishing primary legislation and secondary and tertiary legislation, severance and invalidity being only legitimate in the latter case. Lastly, it would be necessary to correct the indiscriminate usage of the expressions “violation” or “infringement” of the *Charter* and the limitation of *Charter* rights. Since legislation cannot lawfully “violate” or “infringe” the *Charter*, nor is it possible that administrative power to apply the *Charter* be withdrawn.

Second, at the judicial level, the inherent force of the Constitution implies that both provincial and federal superior courts have inherent power to give effect to the *Charter*, although in the case of the federal courts, such a power must be distinguished from its lack of general jurisdiction. In addition, the inherent nature of judicial powers of review has conflicted with the adversarial system. Until now, this has generally implied that judges cannot consider the *Charter*, even as an interpretative tool, when cases have not been pleaded as constitutional issues. Thus, in *Mossop*, the Court required a constitutionalised debate, even when the problem would ultimately not imply striking words out of legislation. Similarly, the need to “constitutionalise” argument has been felt with the emergence of unwritten constitutional principles. These principles are not illegitimate since they have only been used to interpret the exercise of governmental

power, not to negate legislative authority. Nevertheless, questions as to their utility arise since they fall into the broader notions of administrative law reasonableness. Thus, both *Mossop* and the emergence of unwritten constitutional demonstrate insecurity in resolving controversial disputes without resort to a “constitutional” justification.

Moreover, the autonomy of the administrative law and the *Charter* is intimately connected to the problem of defining standards of review and the necessity of raising constitutional arguments. Initially, courts attempted to define separate standards of review at administrative law and under the *Charter*, which has led to the obscure notion of “reasonableness in the administrative law sense”. Thus, even though administrative law standards of review are based on constitutional considerations, these have evolved separately from *Charter* standards of review. Nevertheless, even in administrative law, some opinions have favoured the development of separate standards of review for each issue, although this has unnecessarily complicated matters, and detracted from the fact that at the end of the day, a decision is either reasonable or it is not. While cases such as *Baker* demonstrate that the *Charter* is playing a greater role in the development of administrative law, important theoretical divisions on its role remain, essentially between those who see s. 24(1) of the *Charter* as autonomous remedy, and those who interpret it as a general directive to courts. This theoretical division implies that some judges require constitutional argument whereas others not. Nevertheless, as the *Charter* plays a greater role in statutory interpretation, recourse to s. 24(1) and the correlative need for attorney general notification will implicitly be circumvented. Pending such transformation, it is hoped that a clearer rationale for notification of the attorney general will be presented.

Both the reconciliation of administrative power under the *Charter* and the legal effect of the *Charter* in the judicial review of administrative action confirm the interpretative nature of the autonomy of the *Charter* from administrative law. This autonomy, it has been seen, is based on the premise that the *Charter* is a statutory remedy against government rather than a general mandate to reassess the foundations of administrative law. The role of the *Charter* in statutory interpretation therefore reflects the autonomy of statute and the common law, a situation that received conceptual support in the argument

that the presumption of constitutionality does not operate under the *Charter*, particularly in cases requiring a statute to be “read-in”. However, properly interpreted, the shifting of burdens in constitutional litigation should not imply a fundamental departure from the principle that all acts of public authorities have legal existence until otherwise decided.

Indeed, because it is legally based in the Constitution, it is difficult to accept administrative law as operating under two autonomous foundations. Viewed functionally rather than substantively, administrative law is much richer with the added perspective of the *Charter*. Nevertheless, the *Charter* and administrative law until now have evolved as autonomous bodies of law, operating as once did the law and equity. This interpretation of the *Charter* was not mandated and it was probably necessary on the short term in order to preserve legal certainty and continuity, but it cannot survive in the long run without causing unnecessary complications. The tension between the development of Canadian administrative law and the enactment of the *Charter* therefore demonstrates the contradictory task of acknowledging Canada’s legal past and fitting it into a conceptual framework that takes into account constitutional aspirations. From this perspective, it is fair to speak of unity of constitutional and administrative law,⁸³² in the sense that the *Charter* provides a baseline of rights which can be build upon. Thus, it can be hoped that the *Charter* will be credited as having established a “new rule of law” for Canadian society, rather than a mere vehicle for courtroom contention against government. With the *Charter*, Canadian administrative law has entered into a new phase of development, where it can evolve within the framework defined in the Constitution.

⁸³² Dyzenhaus, *The Unity of Public Law*, *supra* note 19.

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